

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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In the Matter of)	
)	
Applications of AT&T Inc.)	
)	WT Docket No. 11-65
and)	
)	
Deutsche Telekom AG,)	
)	
For Consent to Assign or Transfer Control)	
of Licenses and Authorizations)	
_____)	

**JOINT OPPOSITION OF AT&T INC., DEUTSCHE TELEKOM AG, AND T-MOBILE
USA, INC. TO PETITIONS TO DENY AND REPLY TO COMMENTS**

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INTRODUCTION AND SUMMARY

One overarching imperative drives this transaction: giving AT&T and T-Mobile USA customers the network capacity they need to enjoy the full promise of the mobile broadband revolution. AT&T and T-Mobile USA confront growing spectrum and network capacity constraints, and this transaction will create immense new capacity that will provide enormous benefits to consumers. That new capacity will provide a more robust platform for the next generation of bandwidth-intensive mobile applications while improving consumers' overall service quality through faster data speeds and fewer dropped and blocked calls. And with the scale, spectrum, and other resources generated by this transaction, the combined company will be able to offer Long Term Evolution ("LTE")—the premier next-generation wireless broadband technology—to more than 97 percent of the U.S. population. In the process it will create jobs and investment, help bridge the digital divide, and help achieve the Administration's rural broadband objectives, all without the expenditure of government funds.

For these reasons and others, the transaction has drawn unprecedented support from across the political, social, and commercial landscape, including government officials; organized labor; the high-tech industry and its investors; advocates for minorities, rural communities and the environment; and many others. These supporters include:

- ***The governors of seventeen states***, many with large rural populations: Arkansas, Colorado, Connecticut, Georgia, Idaho, Iowa, Kentucky, Louisiana, Maine, Michigan, Nevada, North Carolina, Ohio, Oklahoma, South Carolina, Tennessee, and Texas, as well as numerous mayors and other public officials from across the country. These government officials support this merger because they recognize that the combined company's expanded LTE deployment will bring much-needed investment, innovation, and job creation to their constituents.
- ***Labor unions representing 20 million workers and educators***, including the Communications Workers of America, the AFL-CIO, the Teamsters, the Service

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Employees International Union, the International Union of Painters and Allied Trades, the United Food and Commercial Workers, the United Mine Workers of America, the National Education Association, and the American Federation of Teachers. These unions support this merger because it will give consumers access to advanced wireless capabilities, while also offering more workers access to good jobs at the only major unionized wireless provider in the United States.

- ***Minority rights advocates*** such as the NAACP, the Hispanic Institute, the Minority Media and Telecommunications Council, Pride at Work, and many others. These groups support this transaction because the combined company's higher-quality mobile broadband services and expanded LTE deployment will help bridge the digital divide and empower the disenfranchised to become full participants in our digital society.
- ***Disabilities rights organizations*** such as the World Institute on Disability, the American Foundation for the Blind, the American Association of People with Disabilities, and the United Spinal Association, which understand that, by facilitating widespread access to next-generation wireless broadband, this merger will increase access to healthcare, workforce participation, and opportunities for civic and social engagement.
- ***Rural advocacy groups*** such as the National Grange, the U.S. Cattlemen's Association, the National Black Farmers Association, the Intertribal Agriculture Council, and the National Rural Health Association, which understand the importance of expanded LTE coverage for bringing telemedicine, distance learning, e-commerce and other vital services to the citizens of rural America.
- ***Environmental groups*** such as the Sierra Club and Future 500, which recognize that the merger will enable broader deployment of smartgrid and other machine-to-machine solutions that can improve energy efficiency, reduce carbon emissions, and help protect the environment.
- ***Venture capital firms*** including Kleiner Perkins Caufield & Byers, Sequoia Capital, Charles River Ventures, Matrix Partners, New Venture Partners, Technology Crossover Ventures, Radar Partners, Norwest Partners, and Lightspeed Ventures, which support this merger because the widely available LTE platform it makes possible will help fuel the entrepreneurship, innovation, and investment that is critical to U.S. leadership in high-tech industries.
- ***Equipment and handset manufacturers*** such as Qualcomm, Corning, Research in Motion, Pantech, Avaya, Juniper Networks, Brocade, JDS Uniphase, Amdocs, Tellabs, ADTRAN, Sierra Wireless, and many others, which understand that the combined company will be able to use spectrum more efficiently, improve service quality, and deploy an expanded LTE network, all of which will in turn drive a virtuous cycle of technology deployment, job creation, and economic growth.

- ***Providers of applications, content, and technology***, including Facebook, Microsoft, Oracle, and Yahoo!; dozens of the nation’s largest, most technologically sophisticated businesses represented by TechNet; the 340 high-tech companies represented by the Silicon Valley Leadership Group; and the more than 3000 small and mid-sized software developers and information technology providers of the Association for Competitive Technology. All of these entities recognize that the combined company’s more robust mobile broadband platform will play a crucial role in supporting the innovative products and services they are developing for American consumers and businesses.

The support this transaction has received from labor unions and the high-tech community is particularly noteworthy. AT&T is aware of no other major FCC transaction in the past fifteen years that has received such a broad level of support from organized labor. That extraordinarily strong support is a complete response to claims by merger opponents that this transaction will harm American workers. Similarly, the support this transaction has received from such a broad cross-section of the high-tech community is a direct repudiation of arguments that the transaction will somehow harm competition, innovation, and consumers. High-tech companies like Avaya, Brocade, Facebook, Microsoft, Oracle, Qualcomm, RIM and Yahoo! rank among the most sophisticated and informed users of wireless platforms, and they are uniquely able to speak to the merits of this transaction because they are in the trenches of the wireless ecosystem every day, investing, innovating, and creating new products and services. That so many of them voice such strong support is compelling evidence that this transaction will bring enormous consumer benefits.¹

¹ See, e.g., Letter from Avaya, Brocade, Facebook, Microsoft, Oracle, Qualcomm, RIM, and Yahoo! at 1-2 (June 6, 2011) (“*Avaya et al. Letter*”) (urging the Commission to “seriously weigh the benefits of this merger and approve it” because “[a]n increasingly robust and efficient wireless network is part of a virtuous innovation cycle and a healthy wireless ecosystem is an important part of our global competitiveness”); see also Press Release, *TechNet Files Supportive Comments with FCC on Proposed Merger of AT&T and T-Mobile* (undated), <http://www.technet.org/technet-files-supportive-comments-with-fcc-on-proposed-merger-of-att-and-t-mobile/> (“Expanding the capability and capacity of broadband spectrum is of critical importance to

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In contrast, merger opponents—consisting largely of Sprint and the applicants’ other wireless competitors, along with the same interest groups that reflexively oppose all significant mergers—try to spin the transaction’s enormous benefits as anticompetitive, with grave predictions of “duopoly.” That rhetoric is as empty as it is overwrought. Sprint and the other wireless competitors do not oppose this transaction because they believe the combined company will cut output, raise prices, and stop innovating, for that could only benefit them and their shareholders. Nor is there any greater merit to the familiar arguments they restate here about impaired access to inputs, such as backhaul, roaming, and handsets; indeed, many of those arguments do not even plausibly relate to this transaction. At bottom, these rivals would simply prefer to compete against a capacity-constrained AT&T and a standalone T-Mobile USA without financial backing from its parent and no clear path to LTE. And they seek to prevent the emergence of a more efficient competitor that will offer consumers higher quality services.² But the capacity and efficiency gains this merger will create are a public interest benefit, not a harm, and they underscore why this transaction should be promptly approved.

TechNet’s member companies. Such increased broadband spectrum will allow our members to grow their business in the technologies, services, software and equipment that make apps, social networking, mobile banking and payments, long-distance learning, mobile commerce, energy management and countless other activities possible”). Statements in support of the transaction are attached as an exhibit. That exhibit includes the statements cited in this Joint Opposition as well as additional statements of support that have not been filed with the Commission.

² “It might be readily apparent that [a merger opponent’s] concerns, at bottom, derive from a view that the merger will in fact be procompetitive, i.e., that competition will be tougher, the [opponent] will have to become more efficient, and prices might go down. Competitor objections in such cases can have the opposite effect from that intended—the agency may be less likely to object to the transaction.” ABA, *The Merger Review Process: A Step-by-Step Guide to U.S. and Foreign Merger Review* 297 (3d ed. 2006).

Opposition arguments concerning the merger's benefits. As we have shown, AT&T is facing severe capacity constraints in markets throughout the United States, and this merger is the surest and most efficient solution to those constraints. Indeed, because AT&T and T-Mobile USA have uniquely complementary networks and spectrum positions, the network capacity of the combined company will far exceed the sum generated by its pre-merger parts. The opponents cannot deny that network integration creates such synergies as a matter of basic engineering. Nor can they dispute that the enormous synergies arising from channel-pooling, utilization efficiencies, and the elimination of redundant control channels would not be possible without this transaction. Instead, merger opponents fall back on the argument that the applicants have not precisely quantified the benefits of network integration and that AT&T could achieve some of the same benefits on its own if it simply invested more money in its network. These claims go nowhere.

First, the applicants *have* quantified these benefits with estimates of the ranges of efficiency gains each will generate. Moreover, as independent experts Professor Reed and Dr. Tripathi explain in their attached declaration, the network synergies identified by the applicants, as well as their estimated effects on capacity, reflect well-established network engineering principles. As they further note, such efficiencies resist precise quantification because of the complexity of the real-world wireless environment, but that does not make them any less real or important.

Sprint and others suggest, nonetheless, that site-specific engineering analyses are somehow required to prove that AT&T will derive enormous benefits from integrating thousands of T-Mobile USA cell sites into the combined company's network. Sprint posits that few or

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none of these cell-sites might be in the areas where AT&T confronts capacity issues. That ignores the reality that T-Mobile USA's network is densely concentrated in urban areas, particularly in high-traffic locations. As a result, many thousands of its sites are necessarily situated in prime locations for addressing AT&T's capacity constraints and filling in gaps in its network, as is illustrated in the attached overlays of T-Mobile USA's cell sites with AT&T's networks in San Francisco and Washington, DC. Indeed, as Professor Reed and Dr. Tripathi confirm, the distance criteria AT&T used to initially determine likely cell-site complementarity are, if anything, quite conservative, and may *understate* actual benefits.

Merger opponents separately argue that, in the absence of this merger, AT&T could take various alternative steps to achieve capacity gains, but those gains could not remotely approach those produced by this transaction. Although merger opponents argue that AT&T could accomplish cell splits on its own by relying on existing towers or other structures, there are not nearly enough structures that (1) are located where AT&T needs them to effectively relieve capacity constraints and fill in gaps in its network, (2) have suitable height, orientation, and lack of obstructions, *and* (3) have space available for AT&T equipment in addition to other providers' equipment. In any case, even if enough suitable third-party cell sites existed, the delays and other obstacles inherent in adding sites on an ad hoc basis would prevent AT&T from achieving benefits on the same scale or in remotely the same timeframe as this merger will permit.

Moreover, while opponents might quibble about the timetable for cell splits, they cannot dispute that, if this transaction were blocked, AT&T would *indisputably lose all the other major categories of network synergies it has identified*. Standing alone, AT&T could not realize channel-pooling or utilization efficiencies or eliminate control channels, because those

efficiencies can arise only from the integration of two networks. Critically, these otherwise unattainable efficiencies will have a multiplier effect in areas where the increased capacity permits the combined company to migrate customers to more spectrally efficient technologies. For example, where these efficiencies reduce the spectrum needed to provide GSM service and thereby free up spectrum that can be redeployed for UMTS service, they will trigger far greater *network-wide* efficiencies because UMTS is more spectrally efficient than GSM by an order of magnitude. Opponents thus miss the point when they complain that some of the identified efficiencies will boost capacity only on AT&T's "outdated" GSM network. Such efficiencies will allow the combined company to shift spectrum more quickly to its UMTS and LTE networks—the very strategy they claim that responsible spectrum stewardship demands. Similarly, by enabling the combined company to redeploy T-Mobile USA's AWS spectrum from UMTS to LTE, the transaction will generate yet further efficiencies in spectrum usage.

Opponents also miss the mark when they argue that AT&T could address its capacity constraints by putting its "idle" AWS and 700 MHz spectrum to use. As these opponents well know, that spectrum is destined for AT&T's LTE service, which it is deploying now, and which is planned to reach 80 percent of the U.S. population by the end of 2013. AT&T cannot, as a practical matter, use that spectrum instead to relieve congestion on its UMTS network because its millions of UMTS customers have handsets that will not work on that spectrum. In any event, even if AT&T could somehow redirect its AWS and 700 MHz spectrum to UMTS, that spectrum *would then be unavailable for LTE*, at least until it could be re-cleared of all UMTS users at some distant future point. In these respects, any argument that AT&T should deploy AWS and 700 MHz spectrum for UMTS is irreconcilable with the opponents' separate argument, which is

implausible on its own terms, that AT&T should further accelerate its LTE deployment to relieve capacity constraints. Opponents cannot have it both ways: they cannot accuse AT&T of not migrating its customers fast enough to newer and more spectrally efficient technologies, but then argue that AT&T should have taken steps that would have undermined that very migration.

Opponents also assert that AT&T should be deploying a “heterogeneous network” that employs Wi-Fi, distributed antenna systems, femtocells, increased sectorization, smart antennas, software defined radios, and other technologies. This advice comes with an air of unreality, as if AT&T’s engineers have somehow missed the past decade of cellular technology advancements. In fact, however, AT&T has been among the most aggressive on these fronts. It has deployed the largest Wi-Fi network of any carrier; pioneered the use of Wi-Fi “hotzones” in high traffic urban and campus environments; deployed DAS systems throughout the country; and deployed hundreds of thousands of femtocells. Each of these techniques has appropriate applications in a cellular network, and AT&T employs each of them today (and has for years). But these techniques also have significant limits, as Professor Reed and Dr. Tripathi confirm. Some, such as Wi-Fi and DAS, can provide only localized capacity offload. Others, such as femtocells and software defined radios, provide no capacity lift at all. These piecemeal technology “solutions” cannot solve the macro-level, system-wide constraints confronting AT&T, and they cannot, alone or together, provide relief on anything approaching the scale or timeline of this transaction.

The opponents next quarrel with the applicants’ showing that the merger will bring the benefits of LTE services to tens of millions of new consumers. First, they contend that T-Mobile USA could feasibly transition to LTE on its own. But as Messrs. Langheim and Larsen explain, Deutsche Telekom has concluded that T-Mobile USA has no commercially or technically viable

option to deploy LTE with its current spectrum holdings. And earlier this year, DT announced that, because of its need to invest in broadband deployment in its core European markets, it cannot support the spectrum-related capital funding its U.S. subsidiary would need for a successful LTE launch. The opponents alternatively contend that T-Mobile USA's current HSPA+ product is just as good as LTE. But, as Messrs. Langheim and Larsen observe, there can be no dispute that LTE is faster, reduces latency, and is more spectrally efficient than HSPA+, nor can there be any dispute that T-Mobile USA will need to deploy LTE to be competitive.

Finally, the opponents contend that market forces would compel AT&T to deploy LTE to a level approaching 97 percent of the population even in the absence of this transaction. In fact, however, AT&T decided to build out LTE to only 80 percent of the population after considering the costs and benefits of increased LTE deployment, including (among other factors) competitive considerations, spectrum limitations, and the disproportionately higher infrastructure costs for rural deployment. The merger will alter that cost-benefit balance both by giving the combined company additional spectrum for LTE in many markets and by increasing the company's scale and scope to a level that can support this massive investment in America's economic and high-tech future.

Opposition arguments concerning the merger's asserted harms. For many years, the merger's opponents have used the same term to describe the wireless marketplace: "duopoly." And they have long invoked that term to support their many attempts, most of them unsuccessful, to win new regulatory advantages from the Commission. The opponents now dust

off the same playbook to oppose this transaction. They claim that, if the merger is approved, then *this time* the market really will “tip” into a Verizon-AT&T “duopoly.”

This “duopoly” rhetoric remains what it has always been: an epithet devoid of analytical content. The term signifies a market with only two sellers, and that is a flatly inapt description of the post-transaction marketplace. To begin with, it obviously ignores a resurgent Sprint, which added “two million wireless subscribers over the past two quarters”³ and now boasts 50 million customers, a billion-dollar advertising budget, and a leading device portfolio, including several award-winning variations of the popular EVO smartphone. It also ignores many other competitors, including some of the fastest growing providers in the industry. As the Commission found last year, roughly three-quarters of Americans live in locations where they can choose among five or more facilities-based wireless providers.⁴ This output-increasing transaction will thus—at most—reduce that number to *four* or more facilities-based competitors.

Merger opponents try to skirt this uncomfortable (for them) fact by proposing market definitions that would exclude most competitors from the Commission’s competitive analysis. The American Antitrust Institute, for example, contends that a “national relevant market is appropriate” and “that means there are *only four participants* in the market—AT&T, Verizon, Sprint, and T-Mobile.” American Antitrust Institute (“AAI”) Comments at 5 (emphasis added). But that claim, and others like it, ignore basic competitive realities in markets throughout America.

³ Sprint Press Release, *Sprint Nextel Reports First Quarter 2011 Results* (Apr. 28, 2011), http://newsroom.sprint.com/article_display.cfm?article_id=1879.

⁴ Fourteenth Report, *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, 25 FCC Rcd 11407, 11447-49 ¶¶ 42-45 (2010) (“*Fourteenth Report*”).

For example, it ignores leading no-contract providers ***MetroPCS***, which has expanded its customer base from about 500,000 subscribers in 2002 to more than 8.9 million today, and ***Leap*** (Cricket), which has expanded from 1.47 million to 5.8 million customers in seven years. These two providers have expanded into markets covering (between them) more than 200 million people. In the first quarter of 2011 alone, MetroPCS and Leap together added a remarkable *1.057 million* net retail subscribers for cell phones, smartphones, laptop USB adaptors, and other personal computing devices, and many of those new subscribers came from traditional contract providers such as AT&T and T-Mobile USA. Strikingly, that figure is greater than the *combined* net retail additions (postpaid and prepaid) by both *AT&T and Verizon* for these same types of subscribers (1.026 million). *See* Section II.C.1, *infra*. Similarly, the notion that the market contains “only four participants” crashes headlong into the success of (among many others) ***U.S. Cellular***, with 6.1 million customers in 26 states; of ***Cincinnati Bell***, a leading wireless provider in southwest Ohio, and of ***Cellular South***, with nearly 900,000 subscribers in several southern states. If, as the opponents contend, national subscribership differences could give one wireless provider insuperable advantages over others, these smaller providers would not exist at all, let alone compete as successfully as they do against Verizon, Sprint, AT&T, and T-Mobile USA.

Despite the opponents’ efforts to gerrymander them out of the competitive analysis, all of these smaller providers also compete in the same *product* market as larger wireless providers, offering service plans with nationwide coverage and limited (if any) retail roaming charges. In fact, MetroPCS reports that it has “morphed into more of a full national type carrier” by deploying “a national footprint that is embedded in all of our rate plans for the everyday low price that we offer our customers” and placing itself “on the forefront of deploying 4G

technologies.”⁵ Leap offers a wide array of Blackberry, Android, and other devices, has nationwide 3G data coverage, and is poised to deploy LTE as well. Moreover, as market data and the opponents’ own public statements confirm, the line between no-contract (“prepaid”) and contract (“postpaid”) services is blurring rapidly, as increasing numbers of customers switch from the latter to the former. For example, MetroPCS is bringing its customers “a postpaid experience without a contract”⁶ and reports that “a third of [its] gross additions” come from “traditional contract carrier post-pay plans”⁷ such as those offered by AT&T and T-Mobile USA. Leap reports that it is “seeing an accelerating shift from postpaid to prepaid.”⁸ Sprint CEO Dan Hesse agrees that “what’s happening in the industry is prepaid as a whole is beginning to cannibalize post-paid.”⁹ And other Sprint executives mention MetroPCS and Leap literally in the same breath with AT&T, Verizon Wireless, Sprint, and T-Mobile USA.¹⁰

⁵ Conference Call Tr., *MetroPCS Communications Inc. at JPMorgan Technology, Media and Telecom Conference*, Thomson StreetEvents, at 2 (May 17, 2011) (quoting CFO Braxton Carter) (“*MetroPCS May 17, 2011 JPM Conf. Tr.*”) (emphasis added).

⁶ Sue Marek, *MetroPCS’ COO on the pros and cons of the AT&T/T-Mobile deal*, FierceWireless (Mar. 30, 2011), <http://www.fiercewireless.com/print/node/91755>.

⁷ Conference Call Tr., *MetroPCS Communications, Inc. at Raymond James Institutional Investors Conference*, Thomson StreetEvents, at 3 (Mar. 7, 2011).

⁸ Conference Call Tr., *LEAP—Q1 2011 Leap Wireless International Inc. Earnings*, Thomson StreetEvents, at 3, 8 (May 6, 2011).

⁹ Conference Call Tr., *Sprint Nextel Corp. Q1 2010 Earnings Call*, Seeking Alpha (May 1, 2010), <http://seekingalpha.com/article/202141-sprint-nextel-corp-q1-2010-earnings-call-transcript?part=qanda>.

¹⁰ Final Transcript, *S—Sprint Nextel Corporation at Bank of America Merrill Lynch Media, Communications & Entertainment Conference*, at 12 (Sept. 15, 2010) (quoting Sprint CFO Bob Brust: “Retail is a tough place. I mean, we have got a lot of retail competition out there You’ve got Verizon, and AT&T and us and T-Mobile, and Leap and Metro and this that and everything else[.]”).

Flawed market definitions aside, the merger opponents’ “tipping to duopoly” theories make no sense in any event. To begin with, the opponents cannot explain why, if those theories were correct, the market has not *already* tipped to a duopoly. To hear the opponents tell it, T-Mobile USA—with approximately 11 percent of subscribers nationwide, steadily declining market share, and no clear path to LTE—is all that stands between today’s “era of competition and growth” and “an entrenched, anti-competitive duopoly.” Sprint Pet. i-ii. That is implausible, to say the least. Several months ago, J.P. Morgan described the company as “struggling for relevance” in this increasingly competitive market,¹¹ and T-Mobile USA’s first-quarter numbers reinforce that concern. Despite a new advertising campaign touted by merger opponents, T-Mobile USA posted one of its weakest quarters on record, losing an additional 471,000 net contract subscribers and prompting MetroPCS CFO Braxton Carter to remark that, “[e]ven without the merger, I think that T-Mobile has somewhat lost their momentum and relevance to the middle tier.”¹²

Nor do opponents offer any coherent account of the mechanism by which, they say, this transaction could “tip” the market to “duopoly.” The opponents argue that the combined company will somehow thwart competition by exercising control over inputs such as handsets, backhaul, and roaming. Those arguments are baseless.

First, as to handsets, there are dozens of manufacturers worldwide, each vying to create a better device than its competitors, and each has strong incentives to sell its devices to as many customers as possible. The combined company could not possibly harm the competitiveness of

¹¹ J.P. Morgan, North America Equity Research, *U.S. Telecom Services & Towers*, at 18 (Jan. 13, 2011) (“*J.P. Morgan January 2011 Analysis*”).

¹² *MetroPCS May 17, 2011 JPM Conf. Tr.* at 3.

this essentially global marketplace, as demonstrated, for example, by the recent success of smaller carriers in obtaining popular Android smartphones. Some merger opponents rehash claims that AT&T (and Verizon) have already blocked competitors' access to LTE-capable handsets, contending that they are somehow responsible for the decision of handset manufacturers not to produce LTE devices interoperable with all 700 MHz frequencies, including the lower 700 MHz A block used by other providers. The opponents have raised this same non-merger-specific claim in ongoing rulemaking proceedings, and that is where they should be resolved. In any event, the claim is false. The decision the opponents cite was the product of an open and transparent international standards-setting process in which AT&T was involved but had no control. And any merger condition that required AT&T to purchase only handsets interoperable throughout the 700 MHz band would, among other harms, severely delay AT&T's LTE deployment and embroil the Commission in complex technology decisions.

Second, the transaction could not increase the combined company's ability or incentive to "leverage" its sale of upstream backhaul services to harm downstream wireless competition. As more and more wireless providers build out next-generation mobile broadband networks, they are increasingly turning to microwave-based and fiber-based Ethernet backhaul solutions instead of traditional TDM-based special access services. The marketplace for those new backhaul solutions, in which ILECs have no inherent advantage, is now indisputably competitive. This transaction will change none of those facts: T-Mobile USA does not sell backhaul services itself, and, in the words of Level 3 CEO James Crowe, "the incredible growth rate" in wireless usage will continue generating "a very large opportunity for a lot of the participants in our industry"

after “[t]he merger[] . . . between T-Mobile and AT&T.”¹³ Those competitive alternatives, combined with traditional special access regulation where still needed, ensure that the combined company will have no *ability* to raise backhaul prices in order to harm downstream wireless competition.

Sprint posits a baroque scenario under which, post-transaction, AT&T (counterfactually) could and would raise downstream retail prices; it (also counterfactually) could and would then raise upstream backhaul prices to deter Sprint and others from competing away AT&T’s retail price increase; Verizon would (implausibly) decide to raise its own retail prices rather than increase its market share; and all other wireless providers would pay the higher backhaul prices and charge higher retail prices too, maintaining their current margins. This theory of vertical leveraging both (1) contradicts Sprint’s “duopoly” rhetoric because it posits a market in which prices rise, margins are preserved, and all providers continue competing and (2) is riddled with fatal analytical flaws discussed in the attached reply declarations of Professors Carlton and Willig. For example, Sprint identifies no plausible basis for supposing that, post-merger, AT&T could benefit from raising its backhaul rates above today’s levels. To the contrary, that strategy would likely generate lost upstream profits that the company could not hope to recoup in the downstream wireless market. Nor, again, is it plausible to suggest—as Sprint does in another key step of its dystopian scenario—that AT&T’s arch-adversary Verizon would decide to increase its own prices rather than win more customers from AT&T by keeping its prices low.

¹³ Conference Call Tr., *Level 3 Communications’ CEO Discusses Q1 2011 Results—Earnings Call*, Seeking Alpha (May 3, 2011), <http://seekingalpha.com/article/267352-level-3-communications-ceo-discusses-q1-2011-results-earnings-call-transcript?part=qanda>.

As AT&T and Verizon underscore every day with their ubiquitous warring advertisements, Sprint’s “Twin Bell” rhetoric is nonsense.

Third, as to roaming, this transaction could hardly tip the U.S. wireless industry to “duopoly” for the simple reason that the applicants currently provide roaming to third-party wireless providers serving only a tiny fraction of subscribers nationally—*i.e.*, providers using GSM/UMTS technologies. As GSM-based carriers, the applicants typically do not provide roaming to CDMA-based providers such as Sprint, Leap, MetroPCS, and U.S. Cellular. Thus, while Sprint and Leap (for example) discuss roaming concerns at some length, little if anything will change for those providers when this merger closes, and the same is true of most other substantial providers, including MetroPCS and U.S. Cellular. Even as to the small percentage of U.S. wireless customers served by GSM-based providers other than AT&T and T-Mobile USA, the combined company will have no incentive or ability to charge commercially unreasonable roaming rates post-merger because the Commission’s roaming rules will forbid it, because the combined company (like AT&T today) will continue to *purchase* more roaming than it *sells* as part of reciprocal bilateral arrangements, and because the terms on which the company purchases roaming can serve as benchmarks in any FCC complaint proceeding brought by its roaming customers. *See* Section II.D.2, *infra*.

As to spectrum holdings, the opponents are also wrong to contend that this transaction will leave AT&T with “too much” spectrum, let alone “the most” in the industry. First, the combined spectrum position of Sprint and Clearwire (of which Sprint owns a 54 percent economic share) is far stronger than AT&T’s today. In CEO Dan Hesse’s words, “[w]hen you combine Sprint’s spectrum position with Clearwire’s spectrum position[,] it put[s] us in the

strongest place for the future.”¹⁴ Indeed, as Sprint’s partner Clearwire recently told investors, it “has the best spectrum position in the industry, on average, 160-megahertz of spectrum in the top markets. *That’s more than the combined AT&T/T-Mobile . . . company would have if their merger is approved.*”¹⁵ And that does not even count the additional spectrum Sprint holds directly.

More important, the relevant question is not how much spectrum a provider holds in some absolute sense, but whether the amount of spectrum a provider holds in a particular area is sufficient to handle the bandwidth demands generated by its subscribers in that area, who (in AT&T’s case) are using three different generations of technology. AT&T’s current spectrum holdings are fast becoming inadequate for that purpose in a growing number of markets. Sprint and others also complain that AT&T has too much low-band spectrum and that such spectrum is superior to the higher-band Sprint/Clearwire spectrum. Even if Sprint’s account of relative spectrum value were accurate, this complaint would not be remotely merger-specific because T-Mobile USA has virtually no low-band spectrum. Similarly, while Sprint complains about the other characteristics of the spectrum it shares with Clearwire, those complaints contradict what

¹⁴ Conference Call Tr., *Sprint Nextel Q1 2008 Earnings Call*, Seeking Alpha (May 12, 2008), <http://seekingalpha.com/article/76869-sprint-nextel-q1-2008-earnings-call-transcript> (emphasis added) (“*Sprint Nextel May 12, 2008 Earnings Call Tr.*”); see also Section II.E, *infra*; Andrew Munchbach, *Live from CTIA 2010’s day two keynote with Sprint CEO Dan Hesse* (Mar. 24, 2010), <http://www.bgr.com/2010/03/24/live-from-ctia-2010%E2%80%99s-day-one-keynote-with-sprint%E2%80%99s-dan-hesse/> (“*Hesse Mar. 24, 2010 Keynote*”). As discussed below, there is no merit to Sprint’s expedient new suggestions in this proceeding that the Commission should view the companies’ spectrum holdings separately or that their spectrum holdings are less valuable than they tell their investors.

¹⁵ Conference Call Tr., *CLWR—Q1 2011 Clearwire Corp. Earnings Conference Call*, Thomson StreetEvents, at 5 (May 4, 2011) (“*Clearwire May 4, 2011 Earnings Call Tr.*”) (emphasis added); see also *Fourteenth Report*, 25 FCC Rcd at 11570, Chart 40.

those two companies tell their investors about that spectrum (*see* Section II.E, *infra*)—and, in any event, they have no relevance to this proceeding, since Sprint/Clearwire will have the same spectrum holdings as they have today, with or without this transaction.

Proposed conditions and restrictions. As in all license-transfer proceedings, opponents present a long wish-list of non-merger-related “conditions” designed to extract regulatory favors that they cannot persuade the Commission to grant them in rulemaking proceedings of general applicability. These include proposals to condition merger approval on concessions relating to pricing, mandatory resale, 700 MHz handset interoperability, special access, privacy, receipt of universal service funding, early termination fees, bill shock, and other industry-wide issues. As the Commission has consistently determined and Sprint itself has previously emphasized, such issues should be addressed, if at all, in industry-wide proceedings, not a company-specific merger proceeding.¹⁶ Finally, insofar as it orders local divestitures, the Commission should follow its sound practice of ensuring that a range of potential bidders are educated about divestiture opportunities and allowing market forces to determine which acquirers are best positioned to compete in a market, rather than prejudging the matter and tipping the playing field towards or against particular firms.

* * *

¹⁶ See Joint Opposition of Sprint and Nextel to Petitions to Deny and Reply to Comments, *Applications of Nextel Communications, Inc., Transferor, and Sprint Corp., Transferee, for Consent to the Transfer of Control*, WT Docket No. 05-63, at 6-7 (filed Apr. 11, 2005) (“Most of the issues raised by the petitions to deny and comments are outside the scope of the proposed merger of Sprint and Nextel. Rather than address effects of the merger, numerous parties are attempting to use this transaction as a vehicle for pursuing pre-existing or collateral policy goals relating to such issues as roaming. . . . The Commission should reject these non-merger specific claims without further consideration.”).

The opponents' submissions are ultimately as short on substance as they are long on rhetoric. We are confident that, after a close review of the facts, the Commission will agree that this merger will generate enormous benefits for consumers, workers, and the economy, with no significant harm to competition.

ARGUMENT

I. THE TRANSACTION WILL BENEFIT CONSUMERS.

A. The Transaction Will Alleviate Severe Existing and Future Spectrum and Capacity Constraints, Create Substantial Synergies, and Expand Output.

As documented in the Public Interest Statement and discussed further below, both AT&T and T-Mobile USA confront growing spectrum and capacity constraints that, absent this transaction, would impair their ability to provide high-quality services to their customers—and merger opponents identify no basis for questioning those conclusions (Section I.A.1). This transaction provides the surest, fastest, and most efficient solution to applicants' capacity challenges, and, again, merger opponents cannot plausibly contend otherwise (Section I.A.2). By addressing the applicants' spectrum and capacity constraints, the transaction will benefit both AT&T and T-Mobile USA customers (Section I.A.3), and there is no merit to merger opponents' assertions that the applicants could achieve the same benefits through alternative measures without the transaction (Section I.A.4). Finally, in addition to alleviating spectrum and capacity constraints, the transaction will also enhance competition by making AT&T more efficient through tens of billions of dollars in cost savings (Section I.A.5).

1. The Applicants Confront Growing Spectrum and Capacity Constraints That Threaten Their Ability To Provide High-Quality Service to Their Customers.

a. AT&T Is on the Leading Edge of the Mobile Broadband Traffic Growth Curve and Faces Spectrum and Capacity Constraints Unparalleled Elsewhere in the Industry.

As set forth in the Public Interest Statement, AT&T's mobile broadband volumes surged a staggering 8,000 percent from 2007 to 2010. Donovan Decl. ¶ 41. AT&T expects that growth to continue, with mobile data traffic on its network projected to increase by a factor of eight to ten by 2015. Moore Decl. ¶ 6. That growth is placing unprecedented strains on AT&T's network and is impairing its ability to continue to meet explosive mobile broadband demands.

Merger opponents cannot deny that AT&T faces skyrocketing demands on its network. But they suggest that this growth is no different from what the industry faces in general.¹⁷ Although it is true that the industry as a whole will have to cope with capacity shortages over time, AT&T believes it is confronting spectrum and capacity constraints sooner and on a greater scale for two reasons. First, AT&T has pioneered the mobile broadband revolution, aggressively introducing and promoting the latest network technologies and devices. Opponents do not contest that, with approximately 31 million smartphone users, AT&T has the **[Begin**

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Information].¹⁸ The proportion of AT&T's customer base that uses smartphones, as well as tablets and other high-bandwidth devices, is also growing dramatically. Indeed, in the fourth

¹⁷ See, e.g., Sprint Petition at 84-85; Leap Petition at 30.

¹⁸ Moore Decl. ¶ 17; The Nielsen Company, *Carrier Share of Smartphone Subscribers—Q4 2010*.

quarter of 2010, integrated devices accounted for more than 80 percent of AT&T's device sales in connection with contract plans. Pub. Int. St. at 21.¹⁹

Second, unlike some of its competitors, AT&T must simultaneously support tens of millions of customers and embedded handsets using three different generations of technology: GSM, UMTS/HSPA, and now LTE. Pub. Int. St. at 22-25. Sprint claims that AT&T should have an easier time managing multiple technologies than either Sprint or Verizon because, it says, AT&T is operating a family of related technologies, while Verizon and Sprint use technologies that are not backward-compatible. Sprint Petition at 99-100. But, whether the technology is backward-compatible or not, Sprint misses the point: the need to support three technologies contributes to AT&T's capacity constraints not because those technologies are unrelated, but because AT&T must divide its spectrum holdings to serve customers on each of them. By contrast, Sprint has so much spectrum that it has the "flexibility" to support yet *another* technology, LTE, on top of those it already has.²⁰

Of course, the Applicants cannot speak definitively to whatever capacity constraints other carriers might or might not face in the short-term: as discussed below, the adequacy of any carrier's capacity to meet demand depends on complex analysis by network engineers of traffic patterns that are heterogeneous across time and geography, as well as myriad other factors

¹⁹ "Integrated devices are handsets with QWERTY or virtual keyboards in addition to voice functionality and are a key driver of wireless data usage." *AT&T 4Q 2010 Investor Briefing*, at 4 (Jan. 27, 2011), http://www.att.com/Investor/Financial/Earning_Info/docs/4Q_10_IB_FINAL.pdf.

²⁰ Andrew Parker & Paul Taylor, *Sprint's 4G move opens way to merger*, Fin. Times (July 12, 2010) (quoting Sprint CEO: "We have the spectrum resources where we could add LTE if we choose to do that, on top of the WiMAX network. The beauty of having a lot of spectrum is we have a lot of flexibility"), <http://www.ft.com/intl/cms/s/0/c4d6eb6a-8de0-11df-9153-00144feab49a.html> ("*Sprint's 4G Move*").

beyond just spectrum holdings. But other carriers have publicly stated, even since this transaction was announced, that they do not face short-term capacity constraints, and the Applicants take them at their word. Pub. Int. St. at 26 n.36. In any case, the relevant question here is whether *AT&T and T-Mobile USA* face significant spectrum and capacity constraints, and the evidence unquestionably demonstrates that they do.

b. AT&T Has Insufficient Spectrum and Network Capacity in Urban, Suburban, and Rural Markets Throughout the Country To Handle the Exploding Demand for Mobile Broadband Services.

The Public Interest Statement details AT&T's significant and growing spectrum and capacity constraints, which, in the absence of this transaction, would impair its ability to serve consumers. Merger opponents charge that AT&T's showing is too vague or unspecific.²¹ But none of them even begins to grapple with the evidence that AT&T presented.²² As Mr. Hogg explained in his declaration, AT&T expects that, by **[Begin Confidential Information]** **[End Confidential Information]**, it will have insufficient capacity to handle the expected traffic demand for its UMTS services in approximately **[Begin Confidential Information]** **[End Confidential Information]** CMAs covering nearly **[Begin Confidential Information]** **[End Confidential Information]** people. Hogg Decl. ¶ 37. In **[Begin Confidential**

²¹ See, e.g., Sprint Petition at 84; Free Press Petition at 40-41.

²² Various parties seek to cast doubt on AT&T's showing by pointing to prior AT&T statements in which the company supposedly has denied having capacity constraints or has said it had sufficient spectrum. See, e.g., Sprint Petition at 95-97; Free Press Petition at 39 & n.99; AAI Comments at 22; CCIA Petition at 21. But many of these statements do not even address capacity issues. See, e.g., Sprint Petition at 96 (quoting statements of AT&T Mobility CEO and AT&T CFO extolling AT&T's "technology choices" and "technology path"). And others were made two or more years ago and, accordingly, are outdated. See, e.g., Free Press Petition at 39 n.99 (statement from 2008); CCIA Petition at 21 (statement from 2009).

Information] **[End Confidential Information]** additional markets covering **[Begin Confidential Information]** **[End Confidential Information]** people, AT&T lacks enough spectrum today even to launch and support UMTS service in at least one county in each of those markets, and thus it can offer only GSM service in those areas.²³ *Id.* ¶ 39. A complete list of these CMAs is attached to Mr. Hogg’s reply declaration. Hogg Reply Decl. ¶ 10, Ex. A.

Furthermore, in many markets, spectrum constraints limit AT&T’s ability to deploy LTE. For example, in approximately **[Begin Confidential Information]** **[End Confidential Information]** CMAs covering about **[Begin Confidential Information]** **[End Confidential Information]** people, AT&T lacks AWS and 700 MHz spectrum to deploy LTE, while T-Mobile USA holds AWS spectrum that could be used to provide LTE. Hogg Decl. ¶ 60. Within another approximately **[Begin Confidential Information]** **[End Confidential Information]** CMAs, covering nearly **[Begin Confidential Information]** **[End Confidential Information]** people, AT&T lacks the 20 MHz of AWS or 700 MHz spectrum needed to deploy LTE with optimal speed and spectral efficiency, whereas the combination of AT&T’s and T-Mobile USA’s spectrum will make that possible. *Id.*²⁴ And AT&T estimates that it is likely to face LTE capacity shortages as early as **[Begin Confidential Information]**

²³ Although the Public Interest Statement indicated that AT&T lacked the spectrum to launch and support UMTS service in **[Begin Confidential Information]** **[End Confidential Information]** CMAs, one of those CMAs, **[Begin Confidential Information]**

[End Confidential Information], was inadvertently double counted and falls in the category of markets where AT&T lacks the spectrum to deploy an additional UMTS carrier to meet demand. Hogg Reply Decl. ¶ 10 n.12.

²⁴ To clarify a statement in the Public Interest Statement (at 41), the merger will provide the combined company with a *contiguous* 20 MHz block of spectrum in all or portions of approximately **[Begin Confidential Information]** **[End Confidential Information]** of these CMAs, while providing 20 MHz of non-contiguous AWS spectrum in the remaining **[Begin Confidential Information]** **[End Confidential Information]** or so CMAs.

[End Confidential Information] in certain major markets where it has deployed LTE. *Id.* That estimate is informed by AT&T’s experience that when it provides a faster network, subscriber usage grows. For example, when AT&T rolled out HSPA+ with Ethernet, it experienced an increase in data traffic of up to [Begin Confidential Information]

[End Confidential Information]. Hogg Reply Decl. ¶ 15. Consistent with this history, AT&T expects a significant increase in traffic when it deploys its LTE network. *Id.*

As Mr. Hogg explains, the market-specific exhaust projections provided in this proceeding are based on the process that AT&T uses in the ordinary course of its business to help make capital budgeting and network planning decisions. Hogg Reply Decl. ¶¶ 6-10. That process relies on well-established cellular technology engineering practices and judgments informed by network performance data and the extensive real-world experience of the engineers that operate AT&T’s networks. *Id.* Sprint’s technical declarant correctly explains that “[m]obile networks are designed to handle traffic during the busiest hour of the day. Traffic engineering is based on probabilistic models that predict a network’s ability to handle a particular level of peak traffic with a level of certainty.” Sprint Petition, Stravitz Decl. ¶ 13; *see also* Reed/Tripathi Decl. at 4 (“Traffic levels vary widely and dynamically among sectors and over time, and what matters to the network planner is the peaks, not the averages.”). And it is just such “busy hour” traffic engineering that AT&T performs to assess its capacity needs. Indeed, it is a principal focus of the engineering group to perform localized, sector-by-sector analyses of busy hour traffic to assess when traffic loads in peak sectors are likely to cause such degraded performance that good engineering practice mandates capacity increases in a market. Hogg Reply Decl. ¶ 7. And AT&T periodically refines its exhaust analysis to reflect its

experience, changes in technology, market trends, and various other factors. *Id.* ¶ 9. In AT&T's experience, such exhaust projections often understate real-world capacity and spectrum constraints in a dynamic environment in which introduction of a single popular application (e.g., a new video streaming service) can cause a sudden and sustained increase in traffic or shift traffic patterns almost instantly. *Id.*

c. Opponents Are Wrong That AT&T's Spectrum and Capacity Constraints Are the Product of Poor Spectrum Management or Underinvestment.

Merger opponents offer three general responses to AT&T's showing that it faces growing spectrum and capacity constraints: accusations that AT&T is "hoarding" spectrum, that AT&T should push more customers off of GSM and more onto LTE, and that AT&T has underinvested in its network or is otherwise to blame for any constraints it faces. None of these responses has merit.

Accusations that AT&T is "hoarding" spectrum. As Chairman Genachowski has explained, it is "just not true," as merger opponents allege here, that "wireless companies are just sitting on top of, or 'hoarding,' unused spectrum that could readily solve [the spectrum crisis]... The looming spectrum shortage is real—and it is the alleged hoarding that is illusory."²⁵ Some merger opponents nonetheless make this same shop-worn claim against AT&T, arguing that AT&T cannot be spectrum-constrained because, they say, AT&T has a greater absolute volume of spectrum than many other providers and is just letting much of it lie fallow. This is baseless.

²⁵ FCC Chairman Julius Genachowski, *The Clock Is Ticking, Remarks on Broadband*, at 7-8 (Mar. 16, 2011), http://transition.fcc.gov/Daily_Releases/Daily_Business/2011/db0316/DOC-305225A1.pdf.

As an initial matter, even the *post-merger* AT&T will still have considerably less spectrum than a key competitor, Sprint. In CEO Dan Hesse’s words, “[w]hen you combine Sprint’s spectrum position with Clearwire’s spectrum position it put[s] us in the strongest place for the future.”²⁶ And Clearwire recently reminded investors that it “has the best spectrum position in the industry, on average, 160-megahertz of spectrum in the top markets. *That’s more than the combined AT&T/T-Mobile . . . company would have if their merger is approved.*”²⁷

Sprint and others also try to support their spectrum-hoarding claims through purported calculations of aggregate spectrum holdings, “subscribers/MHz,” or other similar measures.²⁸ But these measures are of little if any utility in depicting capacity constraints. For one thing, they do not take into account usage per subscriber and thus fail to reflect the actual demand that a provider must accommodate. Thus, for example, even if it were otherwise accurate, MetroPCS’s comparison (at 27) of the number of subscribers it serves per MHz versus AT&T would be virtually meaningless because it ignores the fact that, as noted above, AT&T has the **[Begin Confidential Information]** **[End Confidential Information]** of smartphone users—who consume 24 times the data of traditional cell-phone users (Pub. Int. St. at 21)—while MetroPCS has only recently begun promoting smartphones and targeting more data-intensive users. More broadly, a snapshot measure of subscribers/MHz (or, as Sprint would have it, MHz/million subscribers) ignores key differences among providers in their timing of new service

²⁶ Hesse Mar. 24, 2010 Keynote.

²⁷ See Clearwire May 4, 2011 Earnings Call Tr. at 5 (emphasis added); see also *Fourteenth Report*, 25 FCC Rcd at 11570 Chart 40. As discussed in Section II.E below, Sprint’s efforts to dissociate itself from Clearwire for spectrum aggregation purposes are disingenuous.

²⁸ See, e.g., Sprint Petition at 94; MetroPCS Petition at 27 and Exhs.; Leap Petition at 15-16 & Exh. 3.

deployments. Ironically, MetroPCS recognizes as much when it tries to explain away the markets in which its own calculations show that it serves *fewer* subscribers per MHz than AT&T; it claims that in those areas it “only recently started operations.” MetroPCS Petition at 28. Similarly, AT&T will launch LTE services on its AWS and 700 MHz spectrum this summer, and thus its “subscribers/MHz” for that spectrum is necessarily zero *today*, even though it will grow substantially over time.

Ultimately, the relevant question is not how much spectrum a provider holds on a national basis in some absolute sense, or even on a “per subscriber” basis. Rather, the question is whether a provider has sufficient spectrum and capacity to handle its customers’ bandwidth demands in a given market. And, as discussed above, even Sprint’s own technical declarant agrees that this question can be analyzed only on a highly localized basis taking into account peak traffic demands, which in turn can vary in time and by location. Sprint Petition, Stravitz Decl. at 13; *see also* Hogg Reply Decl. ¶ 7; Reed/Tripathi Decl. at 4, 7. Moreover, numerous other factors affect capacity, from the number and type of technologies a provider supports, to cell density, to the quality of service the provider seeks to offer. As AT&T has established, based on these factors and its actual experience in providing service over its network, its current spectrum holdings are insufficient to meet demand in an increasing number of markets regardless of how much total spectrum it might hold nationally. Hogg Decl. ¶¶ 37, 39; Hogg Reply Decl. ¶¶ 10-11 & Ex. A.

Some opponents also assert that AT&T is letting some of its holdings lie “fallow.”²⁹ That is wrong. AT&T has spectrum in four bands that is suitable for mobile broadband. Its 850 MHz

²⁹ See, e.g., Sprint Petition at 90-93; Public Knowledge Petition at 59; Free Press Petition at 61.

and 1900 MHz spectrum supports GSM and UMTS services. Hogg Decl. ¶¶ 18, 22. And its 700 MHz and AWS holdings are supporting AT&T's LTE service, which AT&T is deploying in major markets this summer, and which will reach 70 million subscribers by the end of this year and approximately 80 percent of the U.S. population by the end of 2013.³⁰ In light of that rollout, it is unclear what opponents mean when they accuse AT&T of failing to use that spectrum. *See* Reed/Tripathi Decl. at 31. AT&T could not have “borrowed” that spectrum prior to its LTE rollout to alleviate the capacity challenges facing its GSM and UMTS services. To begin with, AT&T's embedded base of over 97 million GSM and UMTS customers do not have handsets that can be used with 700 MHz or AWS spectrum. Hogg Decl. ¶ 66; Hogg Reply Decl. ¶ 12. Furthermore, carving out some of that spectrum to support GSM and UMTS services would leave AT&T with insufficient spectrum to deploy faster and far more spectrally efficient LTE services. Hogg Decl. ¶ 66. Consequently, any dedication of 700 MHz or AWS spectrum to GSM or UMTS/HSPA technologies would result in *inefficient* use of that spectrum, which would make it all the more difficult for AT&T to address its growing capacity constraints. Hogg Reply Decl. ¶ 14.

Merger opponents' claims that AT&T could be using its WCS spectrum to relieve congestion are no more persuasive. *See, e.g.,* Sprint Petition at 91. That spectrum remains unsuitable for mobile broadband services. Hogg Reply Decl. ¶ 16. As the Commission has acknowledged, WCS spectrum has been encumbered by technical limitations and overly restrictive rules designed to protect Satellite Digital Audio Radio Service (“SDARS”), which

³⁰ Hogg Decl. ¶ 27; Hogg Reply Decl. ¶ 13; *see also* John Donovan, *AT&T's 4G Evolution* (May 25, 2011), http://attinnovationspace.com/s/editorial.dll?bfromind=31752&eeid=7764994&_sitecat=5548&dcatid=0&eetype=article&render=y&ac=-2&ck=&blogTopic=7619587&date=May%2025%202011%20%209:30AM.

operates in adjacent spectrum.³¹ The recent modifications to the technical and performance rules still fail to make the spectrum usable for mobile broadband wireless services. Hogg Reply Decl. ¶ 16. Those rules limit the A and B Blocks to use in connection with fixed services (and even those uses remain challenging) and effectively prevent the use of the C and D Blocks for all but niche services.³² To take one example, the power spectral density limit imposed by the Commission will require up to four times as many cell sites for adequate voice service on an LTE network and will reduce the network's quality, throughput, and efficiency.³³ Moreover, the

³¹ Report and Order and Second Report and Order, *Amendment of Part 27 of the Communications Rules to Govern the Operation of Wireless Communications Services in the 2.3 GHz Band, Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band*, 25 FCC Rcd 11710, 11711, 11714 ¶¶ 1, 5 (2010) (“2010 WCS Order”), *recon. pending* (noting that the then-current rules for WCS “effectively limit terrestrial operations to fixed services” and that the WCS Band lacks “a permanent regulatory framework”—largely due to the “difficulty of resolving potential interference among the proposed operations of SDARS and WCS licensees in a manner that will permit the two services to co-exist”).

³² See AT&T Petition for Partial Reconsideration, *Amendment of Part 27 of the Commission's Rules to Govern the Operation of Wireless Communications Services in the 2.3 GHz Band, Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band*, WT Docket No. 07-293, IB Docket No. 95-91, GEN Docket No. 90-357, RM-8610, at 13-22 (Sept. 1, 2010) (“AT&T Reconsideration Petition”); AT&T Inc., *Amendment of Part 27 of the Commission's Rules to Govern the Operation of Wireless Communications Services in the 2.3 GHz Band, Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band*, Reply to Oppositions of Sirius XM Radio Inc., Aerospace and Flight Test Radio Coordinating Council, and the Boeing Company to the Petition for Partial Reconsideration of AT&T Inc., WT Docket No. 07-293, IB Docket No. 95-91, GEN Docket No. 90-357, RM-8610, at 3-5 (Nov. 1, 2010). Applicants incorporate these two AT&T pleadings in their entirety by reference. Green Flag Wireless concedes that the C and D blocks cannot be used for mobile broadband. Green Flag Wireless Petition at 6 n.4.

³³ AT&T Reconsideration Petition at 13-22.

new technical and service rules remain contested by all sides,³⁴ and the resulting uncertainty has meant that licensees and equipment vendors have yet to make decisions about equipment design, manufacturing, and acquisition. Thus, the devices and infrastructure to use WCS for mobile broadband services do not exist. Hogg Reply Decl. ¶ 16. For all these reasons, AT&T's WCS spectrum is not a viable solution for its capacity constraints for the foreseeable future.³⁵

Nor, contrary to opponents' claims,³⁶ does the spectrum AT&T is seeking to acquire from Qualcomm provide a feasible way for AT&T to address spectrum-exhaust issues. Again, opponents ignore the fact that the Qualcomm spectrum could not be used to address congestion in the UMTS or GSM networks, both because it is unpaired and because the handsets of AT&T customers using those services are not compatible with 700 MHz spectrum. Hogg Reply Decl. ¶¶ 62-63. As for LTE, even if the Qualcomm spectrum is available by late 2014 (at the earliest), as currently estimated, it will not solve all of AT&T's capacity challenges for that service either. The Qualcomm spectrum is unpaired (*i.e.*, one-way) and, even after the technology, standards, and equipment are available to integrate it with two-way spectrum, it will provide only a

³⁴ In addition to AT&T, the WCS Coalition, Sirius XM, the Aerospace and Flight Test Radio Coordinating Council, Boeing, and ARRL filed petitions for reconsideration or clarification.

³⁵ Green Flag Wireless claims that WCS spectrum in the A and B Blocks can be used for mobile broadband using WiMAX equipment. Green Flag Wireless Petition at 6. But of course, AT&T is deploying an LTE network, not a WiMAX one. And, as the WCS Coalition reports, once WCS spectrum becomes suitable for mobile broadband service, "LTE is the most viable 4G technology for WCS licensees to achieve economics of scale and produce a viable business model." Ex Parte of the WCS Coalition, *In re Amendment of Part of Commission's Rules to Govern the Operation of Wireless Communications Services in the 2.3 GHz Band*, WT Docket No. 07-293, at 2 (filed May 31, 2011). In any case, "no vendor is known to have developed a mobile 802.16e WiMAX solution." *Id.*, Attachment, Kurt Schaubach, Conexus Technology Advisors, Standard Setter and Equipment Development Process for the U.S. 2.3 GHz Band, at 2.

³⁶ See, e.g., RCA Petition at 27; Cincinnati Bell Petition at 26.

supplement to downlink capacity. Moore Decl. ¶ 25; Hogg Reply Decl. ¶ 63. Thus, although this spectrum will be valuable to help bridge the gap until the Commission makes additional spectrum available for auction, it is not in any way comparable to, or a substitute for, the spectrum that AT&T will obtain from this transaction.³⁷

In sum, AT&T's existing spectrum is either already dedicated to specific uses, or not suitable for addressing the spectrum and capacity constraints that AT&T currently confronts. Opponents' charges to the contrary simply misapprehend the facts.

Claims That AT&T Should Transition Customers Faster. Merger opponents also assert that AT&T's capacity constraints arise from its alleged failure to transition customers more rapidly *from* GSM (so as to free up spectrum for use with more spectrally efficient technologies) and *to* more spectrally efficient LTE.³⁸ Ironically, as AT&T explained in the Public Interest Statement, the transaction will achieve exactly those goals: the synergies will add capacity and give AT&T the "turnaround" time to transition customers and redeploy spectrum to more efficient technologies and facilitate a broader and more robust deployment of LTE without

³⁷ Although various opponents reiterate earlier proposals to consolidate this proceeding with the AT&T/Qualcomm proceeding, those proposals are without merit for the reasons previously stated in the oppositions of AT&T and Qualcomm T-Mobile USA, incorporated by reference here. See Joint Opposition of AT&T Mobility Spectrum LLC and Qualcomm Incorporated to Joint Motion to Consolidate, *Application of AT&T Mobility Spectrum LLC and QUALCOMM Incorporated for Consent to the Assignment of Licenses and Authorizations, Applications of AT&T Inc. and Deutsche Telekom AG for Consent to Assign or Transfer Control of Licenses and Authorizations*, WT Docket Nos. 11-18, 11-65 (May 4, 2011); Opposition of Deutsche Telekom to Requests to Consolidate Proceedings, *Application of AT&T Mobility Spectrum LLC and QUALCOMM Incorporated for Consent to the Assignment of Licenses and Authorizations, Applications of AT&T Inc. and Deutsche Telekom AG for Consent to Assign or Transfer Control of Licenses and Authorizations*, WT Docket Nos. 11-18, 11-65 (May 4, 2011).

³⁸ See, e.g., Sprint Petition at 99-103; Leap Petition at 29-30; MetroPCS Petition at 26, 31; CCIA Petition at 23-24; Free Press Petition at 61.

subjecting AT&T customers to reduced service quality due to lack of network capacity. Pub. Int. St. at 40-41; Hogg Reply Decl. ¶ 17. But opponents are wrong in claiming that AT&T on a standalone basis could have avoided its capacity problems if it had simply spent more money (for example, in the form of handset subsidies) to transition customers more rapidly. AT&T's experience, and that of the industry generally, demonstrates that transitioning enough customers to achieve meaningful traffic offload is not nearly as easy or fast as opponents suggest. Rather, such transitions, particularly when they involve large numbers of customers, require significant time to accomplish in a customer-friendly way.

Notwithstanding opponents' disingenuous characterization of GSM as "outdated,"³⁹ approximately **[Begin Confidential Information]** **[End Confidential Information]** customers subscribe to AT&T's GSM services today. Hogg Decl. ¶¶ 5, 18; Larsen Reply Decl. ¶ 15 ("GSM is the dominant wireless technology today across the globe."). They do so even though more advanced wireless services, including mobile broadband, have been available and heavily promoted for years. For many of these customers, their existing service fulfills their needs, and they prefer the familiarity of their existing handsets and service to a newer, "better" service. *See* Hogg Reply Decl. ¶ 18. Consequently, as Public Knowledge observes (at 51), such customers "may only want to use legacy services for years to come." The Commission too has recognized the need for lengthy transitions from one service to another—it set a five-year transition period for the sunset of analog cellular services.⁴⁰

³⁹ *See, e.g.,* Free Press Petition at 54; Leap Petition at 29.

⁴⁰ Report and Order, *Year 2000 Biennial Regulatory Review - Amendment of Part 22 of the Commission's Rules to Modify or Eliminate Outdated Rules Affecting the Cellular Radiotelephone Service and Other Commercial Mobile Radio Services*, 17 FCC Rcd 18401, 18405, ¶ 5 (2002).

Experience confirms that it takes years to transition customers from one technology to the next, even if they are offered economic incentives to switch. For example, after nearly [Begin Confidential Information] [End Confidential Information] of intense efforts to transition approximately [Begin Confidential Information] [End Confidential Information] customers to digital service, about [Begin Confidential Information] [End Confidential Information] subscribers remained to migrate despite the prospect of complete service shutdown and [Begin Confidential Information]

[End Confidential Information]. Hogg Reply Decl. ¶ 21. It clearly will take far longer to migrate [Begin Confidential Information] [End Confidential Information] customers from GSM.

AT&T's experience with customer transitions is consistent with that of the industry at large. Indeed, Sprint itself has been transitioning 800 MHz spectrum users for *seven* years thus far—even though, as Sprint and representatives of the public safety community told the Commission, “[e]very day of delay in completing 800 MHz reconfiguration is another day that first responders remain at risk; accordingly, a stay [of the rebanding process] would substantially harm [] police, firefighters and other public safety personnel.”⁴¹ Notwithstanding the clear public interest in ensuring that public-safety officers not suffer from radio frequency interference from Sprint and an original directive to complete the process in three years,⁴² on June 1, 2011,

⁴¹ Opposition of Nextel Communications, Inc. to Motion for Partial Stay, *Improving Public Safety Communications in the 800 MHz Band*, WT Docket 02-55, ET Docket Nos. 00-258, 95-18, RM-9498, RM-10024, at 2 (filed Nov. 26, 2004).

⁴² Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order, *Improving Public Safety Communications in the 800 MHz Band*, 19 FCC Rcd 14969, 15001 ¶ 57 (2004).

Sprint informed the FCC that it had completed only about 70 percent of the necessary reconfigurations just in non-border areas,⁴³ making it likely that the transition will take several years longer than the seven it has taken already.

Ultimately, what merger opponents wrongly characterize as delay on the part of AT&T actually reflects a responsible and customer-friendly approach to the transition away from AT&T's GSM service. Contrary to opponents' claims,⁴⁴ AT&T is not actively encouraging new users to sign up for 2G GSM service. AT&T already has stopped actively marketing 2G devices to postpaid customers, and it offers a very limited number of such devices to prepaid customers. Christopher Reply Decl. ¶ 30 n.6; Hogg Reply Decl. ¶ 19. Moreover, AT&T has targeted GSM customers with heavy traffic patterns in capacity-constrained areas for migration to UMTS, including **[Begin Confidential Information]**

[End Confidential

Information]. Hogg Reply Decl. ¶ 19.

AT&T also is aggressively pursuing opportunities to redeploy spectrum from GSM to UMTS whenever possible without significantly reducing service quality to existing GSM customers—in **[Begin Confidential Information]**

[End Confidential

⁴³ Letter from Lawrence R. Krevor, Vice President – Spectrum, and James B. Goldstein, Director, Spectrum Reconfiguration, Sprint Nextel, to David Furth, Deputy Bureau Chief, Public Safety and Homeland Security Bureau, FCC, *Improving Public Safety Communications in the 800 MHz Band*, WT Docket 02-55, at 2 (June 1, 2011) (Sprint Nextel's Status Report on 800 MHz Band Reconfiguration).

⁴⁴ See, e.g., Sprint Petition at 102. Sprint's suggestion (at *id.*) that AT&T is at fault because the current version of the iPhone does not run on HSPA+ ignores the fact that *Apple*, as the manufacturer of the iPhone, decides what technologies will be supported.

Information]. Hogg Reply Decl. ¶ 23. Finally, it is important to recognize that even if AT&T could completely transition all of its customers in a particular market from GSM to UMTS in an extremely accelerated manner, AT&T still could not turn off GSM service in that market because AT&T’s GSM customers in the remainder of the country still would expect to be able to use GSM service when they traveled to the “turned-down” area. *Id.* In short, AT&T’s current capacity constraints cannot be attributed to some failure to transition customers from GSM service.

Similarly baseless are claims that AT&T’s capacity constraints have arisen because it is not doing enough to migrate customers to LTE. In fact, in January of this year, AT&T accelerated its LTE deployment plan by a full year. Hogg Reply Decl. ¶ 24. Thus, as noted above, AT&T plans to cover 80 percent of the U.S. population by the end of 2013 with LTE. Sprint suggests that AT&T should be doing more, such as “pre-seeding” the market with LTE devices. Sprint Petition at 102. But AT&T has been offering an LTE-capable USB modem since October 2010, well in advance of its roll-out of LTE services—much earlier than the only example of pre-seeding that Sprint provides. Hogg Reply Decl. ¶ 24; Sprint Petition, Stavitz Decl. ¶ 18 (noting that T-Mobile USA “launched a HSPA+ capable dongle” a little more than two months before launching HSPA+ service). As for handsets, *no* carrier offered an LTE handset until the fourth quarter of last year, and AT&T already has announced that it will be offering such handsets later this year, in tandem with its rollout of LTE service.⁴⁵

⁴⁵ Hogg Reply Decl. ¶ 24 n.19; Reed/Tripathi Decl. at 32; John Donovan, *AT&T’s 4G Evolution* (May 25, 2011), http://attinnovationspace.com/s/editorial.dll?bfromind=31752&eeid=7764994&_sitecat=5548&dcatid=0&eetype=article&render=y&ac=-2&ck=&blogTopic=7619587&date=May%2025%202011%20%209:30AM.

After spending billions of dollars to roll out an LTE network, AT&T will have clear incentives to market LTE service and encourage users to migrate to that service. But its experience demonstrates that such migration takes time to achieve. For example, in the first year after AT&T began its UMTS deployment, fewer than **[Begin Confidential Information]**

[End Confidential Information] of AT&T’s total customers began subscribing to UMTS service. Hogg Decl. ¶ 40. After five years of heavily marketing UMTS service (including the types of offers noted above), only about **[Begin Confidential Information]**

[End Confidential Information] of its total customers subscribed to UMTS. *Id.*; Hogg Reply Decl. ¶ 20. Ultimately, even Sprint itself understands that the transition to LTE is not a magic bullet, acknowledging that “*any transition [to LTE] is likely to occur over many years.*” Sprint Petition at 44 (emphasis added).⁴⁶

Arguments that AT&T is to blame for its spectrum and capacity constraints. Some merger opponents assert that AT&T’s spectrum and capacity constraints are its own “fault” and that merger approval would somehow reward AT&T for its allegedly poor investment decisions, technology choices, and operations.⁴⁷ Even if that argument were factually plausible, which it is not, it misconceives the Commission’s task, which is not to assign blame for or second-guess

⁴⁶ MetroPCS claims that it “turn[ed] over and replace[d] handsets in more than one-half of its entire subscriber base in one year” and that AT&T could do the same. MetroPCS Petition at 31. But MetroPCS is in a very different position from AT&T. Among other things, it has significantly fewer customers, which makes migration less complex. And because a much smaller proportion of MetroPCS’s customers already had smartphones, they were more likely to be receptive to handset upgrades.

⁴⁷ See, e.g., Sprint Petition at 87-88; *id.*, CRA Decl. ¶ 187; MetroPCS Petition at 28-29.

past choices—with the benefit of 20-20 hindsight—but to act in the best interests of consumers going forward by enabling AT&T to address its spectrum and capacity constraints.⁴⁸

Just as important, the claim that AT&T has underinvested in its network is factually untenable.⁴⁹ Over the past four years, AT&T has invested more than \$75 billion to upgrade and maintain its wireline and wireless networks—more than any other public company has invested in the United States.⁵⁰ During that same period, AT&T spent an *additional* \$23 billion on spectrum on spectrum purchases and company acquisitions to expand its wireless network footprint and enhance network performance.⁵¹ Further, between 2008—the year that the 3G

⁴⁸ The Commission has already made that precise point in analogous circumstances, explaining, “it is a long-standing principle of the Commission not to dictate technology choices, and while the Commission is not required to ‘reward’ the Applicants for difficulties that may have resulted from their choice of technology, *neither is it our role to punish them for those difficulties or those choices.*” Memorandum Opinion and Order, *Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation for Consent to Transfer Control of Licenses and Authorizations*, 19 FCC Rcd 21522, 21608 ¶ 227 (2004) (“*Cingular/AT&T Wireless Order*”) (emphasis added).

⁴⁹ Sprint’s criticism of AT&T’s purported underinvestment is particularly ironic. Sprint had the lowest capital expenditure, as a percentage of service revenue, of *any* wireless provider from the second quarter of 2008 to the fourth quarter of 2009. GAO, *Enhanced Data Collection Could Help FCC Better Monitor Competition in the Wireless Industry*, GAO-10-779, at 21, Fig. 9 (July 2010), <http://www.gao.gov/new.items/d10779.pdf>. And last year, Sprint spent the same on *advertising* as on investments in its wireless network. Sprint-Nextel Corporation, Annual Report (2010 10-K), at F-11 (“Advertising expenses totaled \$1.4 billion for the year ended December 31, 2010”) & F-33 (Feb. 24, 2011) (listing Sprint-Nextel’s wireless capital expenditures as \$1.455 billion for 2010).

⁵⁰ AT&T Inc. 2007 Annual Report at 64; AT&T Inc. 2008 Annual Report at 60; AT&T Inc. 2010 Annual Report at 71; Testimony of Randall Stephenson, Hearing of the House Committee on the Judiciary, Subcommittee on Intellectual Property, Competition and The Internet (May 26, 2011) (“*Stephenson May 26, 2011 House Testimony*”).

⁵¹ AT&T Inc. 2007 Annual Report at 45, 60; AT&T Inc. 2008 Annual Report at 35, 41, 58; AT&T Inc. Quarterly Report (1Q 2008 10-Q), at 23 (May 7, 2008); AT&T Inc. 2009 Annual Report at 50, 68; AT&T Inc. 2010 Annual Report at 48. This figure includes the approximately \$1.925 billion purchase price for spectrum from Qualcomm, which of course remains subject to approval by the Commission. 2010 Annual Report at 48.

iPhone triggered a surge in mobile broadband use—and the end of 2010, AT&T invested almost \$33 billion in new spectrum and capital expenditures to upgrade its wireless network, including a 50-percent increase in wireless network investment from 2009 to 2010.⁵²

There likewise is no merit to opponents' attempt to point the finger at AT&T's exclusivity arrangement for the iPhone as a blameworthy source of its current spectrum and capacity constraints. *See, e.g.*, Free Press Petition at 65-66. That arrangement has been an unqualified boon for consumers. AT&T, together with Apple, made the enormous investments needed to develop, introduce, and market the iPhone without any guarantee of success at the time, and the exclusivity helped support this investment. It is now clear in hindsight that this highly uncertain initiative succeeded, brought tremendous benefits to consumers, and spawned a new wave of device, operating-system, and application competition and innovation.⁵³ But not all

⁵² AT&T Inc. 2008 Annual Report at 35, 41; AT&T Inc. Quarterly Report (1Q 2008 10-Q), at 23 (May 7, 2008); AT&T Inc. 2009 Annual Report at 68, 71; AT&T Inc. 2010 Annual Report at 48, 71. This figure also includes the price for Qualcomm spectrum. While opponents note that AT&T's \$21.1 billion in capital expenditures on its wireless network from 2008 to 2010 was \$1 billion less than Verizon reported spending during that period, *see, e.g.*, Sprint Petition at 86, their comparison entirely excludes spectrum purchases. And in any case AT&T's 2010 wireless capital expenditures were higher than Verizon's (about \$9.17 billion versus \$8.44 billion). AT&T Inc. 2010 Annual Report at 71; Verizon Communications 2010 Annual Report at 29. Of course, the question whether AT&T or Verizon spent more on its network over some time frame is beside the point. *Both* companies have spent enormous sums of money to upgrade their networks and keep pace with customer demand.

⁵³ Indeed, industry analysts have attributed the success of Android-based devices in part to AT&T's exclusive arrangement with Apple for the iPhone: "When the iPhone entered the market it shocked the carriers and presented a fundamental challenge to other handset makers... . The only place OEMs could turn – the only real choice they had – was Android. And they embraced the platform with gusto. Verizon, seeing consumers head to AT&T to get the iPhone, embraced once-rival Google and developed a brand for its Android handsets. The company spent millions to build consumer awareness around 'Droid.' ... Without the iPhone (and Apple's AT&T exclusivity) Android would just not be where it is today." Greg Sterling, *What's Behind Android's Success: the iPhone*, Internet2Go – An Opus Research Advisory Service (Nov. 8, 2010), <http://internet2go.net/news/carriers/whats-behind-androids-success-iphone>.

such investments succeed, as exemplified by a prior handset initiative among Apple, Motorola, and AT&T to create a device called the “ROKR,” which was not a success. The fact that AT&T continues to push the envelope on innovation and was rewarded with the success of the iPhone is reason to credit, not blame, AT&T.

d. T-Mobile USA Faces Capacity Constraints in a Growing Number of Markets and Has No Clear Path to LTE.

As Deutsche Telekom Senior Vice President Kim Larsen explains in his declaration, T-Mobile USA also expects to face spectrum exhaust in a number of key markets **[Begin Confidential Information]**

[End Confidential Information]. Larsen Decl. ¶¶ 12, 18. Opponents cite previous statements in which T-Mobile USA had suggested that it had enough spectrum in the short to medium term.⁵⁴ But, as Larsen explains, “the incredible growth in demand for data services on the T-Mobile USA HSPA+ network has required a near constant adjustment to determine projected spectrum capacity constraints,” and such projections have consistently “surpass[ed]” T-Mobile USA’s “previous estimates of capacity constraints and spectrum exhaustion.” Larsen Reply Decl. ¶¶ 18, 20.

In addition to facing looming capacity constraints for existing services, T-Mobile USA “does not have access to the spectrum needed to deploy LTE in an economically and technically sustainable fashion.” Langheim Decl. ¶ 12. Opponents point to prior T-Mobile USA statements indicating that it had a “long-term” strategy for evolution to LTE.⁵⁵ But, as Larsen explains, although T-Mobile USA had hoped to follow a technology path from GSM to HSPA/HSPA+ to

⁵⁴ See, e.g., Sprint Petition at 117-18; AAI Comments at 4.

⁵⁵ See, e.g., AAI Comments at 23; NNI and Teletruth Petition at 12.

LTE, it “is inhibited from following th[at] standards-expected path of migration to LTE due to a lack of spectrum.” Larsen Reply Decl. ¶ 25.

First, T-Mobile USA’s options for LTE with its *current* spectrum holdings are “not commercially viable.” Larsen Decl. ¶ 23. T-Mobile USA has already dedicated those holdings to UMTS/HSPA+ and GSM technologies, and **[Begin Confidential Information]**

[End

Confidential Information] Larsen Decl. ¶ 30; Larsen Reply Decl. ¶ 19. Moreover, T-Mobile USA **[Begin Confidential Information]**

[End Confidential

Information] Larsen Decl. ¶ 23. And any offering it could make would be **[Begin**

Confidential Information]

[End Confidential Information] *Id.*

Second, although in theory T-Mobile USA could try to acquire additional spectrum to alleviate these problems, it has now concluded that its options for acquiring sufficient additional spectrum **[Begin Confidential Information]**

[End Confidential Information] Larsen Decl. ¶ 9; Larsen

Reply Decl. ¶ 17.⁵⁶ And T-Mobile USA also faces obstacles to obtaining the billions of dollars

⁵⁶ Some opponents suggest that T-Mobile USA could enter into a transaction with LightSquared or Clearwire to obtain the spectrum needed to deploy LTE. *See, e.g.*, Leap Petition at 32; RCA Petition at 29; Clearwire Comments at 5. As Deutsche Telekom’s Larsen explains,

in capital needed to acquire new spectrum. As Deutsche Telekom Senior Vice President Thorsten Langheim explains, “[t]he required substantial investments in LTE in the United States would significantly stretch Deutsche Telekom’s financial capability or, alternatively, force [it] to reallocate investments from our core Europe operations into T-Mobile USA, which has been shrinking for the last two years and which is lacking a clear path to ... LTE to stay competitive.” Langheim Decl. ¶ 14. Because Deutsche Telekom has decided not to divert capital from its core European business into the United States, it has directed T-Mobile USA to “fund its future itself.”⁵⁷

Some merger opponents attempt to minimize the significance of LTE to T-Mobile USA’s future, pointing to company statements that, they suggest, indicate that HSPA+ is equivalent in performance to LTE. *See, e.g.*, RTG Petition at 9; Sprint Petition at 51. But while HSPA+ competes today, “LTE is a major advance for the mobile industry in terms of performance and efficiency.” Larsen Reply Decl. ¶ 26. LTE technologies and devices remain in their infancy, and LTE will become increasingly superior to HSPA+ over time as the LTE ecosystem matures worldwide. *Id.* ¶ 26; Hogg Reply Decl. ¶ 14 n.17. Even in its launch phase today, LTE offers downlink throughput speeds that are up to two times faster than HSPA+ with dual carriers. Larsen Reply Decl. ¶ 24; Hogg Decl. ¶ 24; Hogg Reply Decl. ¶ 14. And LTE provides up to an

however, **[Begin Confidential Information]**

[End Confidential Information]. Larsen Reply Decl. ¶¶ 4, 17.

⁵⁷ Deutsche Telekom – T-Mobile USA Investor Briefing, at 4 (Jan. 20, 2011), http://www.telekom.com/dtag/cms/contentblob/dt/de/979192/blobBinary/transcript_20012011.pdf (Deutsche Telekom CEO Rene Obermann) (“*DT Jan. 20, 2011 Analyst Briefing*”); *see also* Langheim Decl. ¶ 14 (“Because Deutsche Telekom’s financial priorities must be focused on Europe, however, Deutsche Telekom’s CEO Rene Obermann has stated publicly that T-Mobile USA ‘has to develop into a self-funding platform that is able to fund its future itself.’”).

approximately 60-percent increase over HSPA+ in uplink speeds, which is important for many applications, such as video conferencing and interactive gaming. Hogg Reply Decl. ¶ 14. LTE is also 30 to 40 percent more spectrally efficient, has dramatically less latency, and is better able to handle signaling load. Hogg Decl. ¶¶ 25-26; Larsen Reply Decl. ¶ 24. And it allows for scalable spectrum bandwidth of up to 40 MHz and the deployment of a simpler network architecture. Larsen Reply Decl. ¶ 24.

Global developments will cement this superiority of LTE over HSPA+. As providers across the world adopt LTE, LTE network equipment and end-user devices will attract the lion's share of research and development. Hogg Reply Decl. ¶ 14 n.17. And while LTE is just starting to gain momentum, HSPA+ is approaching the end of its deployment cycle. Larsen Reply Decl. ¶ 26. Eventually, the ecosystem for HSPA+ will lack the scale and growth needed to keep pace with LTE. Hogg Reply Decl. ¶ 14 n.17. As MetroPCS's CEO recently noted, for example, the increased economies of scale as LTE becomes more prevalent will bring down the price of handsets.⁵⁸ Therefore, Deutsche Telekom's Langheim and Larsen conclude, "LTE's significant and quantifiable improvements over HSPA make it vitally important that T-Mobile USA deploy an LTE network," Larsen Reply Decl. ¶ 22, and T-Mobile USA needs LTE "to stay competitive," Langheim Decl. ¶ 14.

⁵⁸ Phil Goldstein, *MetroPCS Adds 725K Subs, Banks on Android*, Fierce Wireless (May 3, 2011), <http://www.fiercewireless.com/story/metropcs-adds-725k-subs-q1-banks-android/2011-05-03>.

2. Merger Opponents Provide No Basis To Challenge the Applicants’ Showing That the Transaction Will Generate Substantial Capacity-Increasing Efficiencies.

Try as they might, the mergers’ opponents cannot deny a core consumer benefit of this transaction: capacity-increasing network synergies. Because AT&T and T-Mobile USA have well-matched cell site grids, use the same network technologies, and have contiguous and compatible spectrum holdings, the transaction will increase capacity through more efficient use of spectrum and network resources, and the combined network will far exceed the sum of its parts. That increased capacity will be *the functional equivalent of new spectrum*. Those otherwise unavailable capacity increases will give the combined company the flexibility it needs to improve service quality for existing services and reallocate spectrum to more spectrally efficient technologies. Indeed, because these efficiencies will enable such spectrum redeployment, they will have a multiplier effect. For example, efficiencies that reduce the spectrum needed to provide GSM service and thereby free up spectrum that can be redeployed for UMTS service will trigger far greater *network-wide* efficiencies because UMTS is more spectrally efficient than GSM by an order of magnitude.

a. The Transaction Will Create Substantial New Capacity, and Merger Opponents Identify No Reason To Conclude Otherwise.

The Public Interest Statement details the transaction’s key network synergies and explains how they will increase capacity. Merger opponents offer little in the way of a substantive challenge to these synergies. Instead, they seek to dismiss them as hypothetical or too vague. They fail on both counts. The efficiencies identified here are not mere hypotheses or theories—they are the product of basic, well-accepted network engineering concepts and

industry practice. Hogg Reply Decl. ¶ 27; Larsen Reply Decl. ¶ 15. The Commission has appropriately credited such efficiencies in past wireless transactions,⁵⁹ and AT&T's own experience confirms that such efficiencies are achieved when wireless networks are integrated.

Hogg Reply Decl. ¶ 37. As independent experts Professor Reed and Dr. Tripathi explain:

each of the categories of network synergies that AT&T has identified is real and achievable in practice, . . . the engineering assumptions and logic that AT&T's engineers have employed to demonstrate the synergies are consistent with wireless engineering theory and commercial cellular network practice and experience, and . . . consumers are, in fact, likely to experience substantial and tangible benefits from network integration and evolution that proceeds as AT&T has described.

Reed/Tripathi Decl. at 3.⁶⁰

Further, "criticisms that AT&T's network efficiency predictions are not quantified in terms of precisely how many more calls the combined network will be able to carry, for example, are misguided. Such estimates are neither meaningful—the answer depends upon the geographic and temporal distribution of the traffic and the service quality levels AT&T and its customers will tolerate—nor subject to precise quantification." Reed/Tripathi Decl. at 4; *see also* Hogg

⁵⁹ See, e.g., *Cingular/AT&T Wireless Order*, 19 FCC Rcd at 21602-03, 21607-08 ¶¶ 210-12, 225-26.

⁶⁰ Professor Reed is a widely published and well-known authority on wireless technology and engineering, and in 2005, he was named a Fellow of the IEEE for his contributions to software radio and communications signal processing and for leadership in engineering education. Professor Reed has lead research contracts with the Defense Projects Research Agency, the Office of Naval Research, the Army Research Office, and the National Security Agency, and he has advised corporations and government agencies, including the Office of Science & Technology Policy and the offices of several members of Congress, on a wide range of cellular technology and cutting edge wireless topics. Dr. Tripathi has worked in the wireless industry as an engineer designing and optimizing wireless networks and currently provides technical consulting and specialized training for companies throughout the industry. Professor Reed and Dr. Tripathi have collaborated on an authoritative text on cellular technology and engineering, which will be released this year.

Reply Decl. ¶ 27. The parties' inability to perform detailed network integration at this stage of the transaction (either as a practical or legal matter) further limits how specific the applicants can be in quantifying the synergies that the transaction will produce. Within those practical constraints, however, the applicants have provided ample information, including the range of gains they expect to achieve with a high degree of confidence, and they provide even more detail below. Notably, Professor Reed and Dr. Tripathi are of the view that, in some cases, the estimates provided "likely understate the potential gains." Reed/Tripathi Decl. at 6.

Denser cell grid. The combined company expects to integrate more than **[Begin Confidential Information]** **[End Confidential Information]** T-Mobile USA cell sites, effectively splitting cell sites and, as Professor Reed and Dr. Tripathi validate, thereby doubling the traffic volumes that can be carried over the same amount of spectrum in the area served by the original sites. Hogg Decl. ¶ 43; Reed/Tripathi Decl. at 8. The resulting network will be significantly denser than either company's network could be in the absence of this transaction. In particular, based on the **[Begin Confidential Information]** **[End Confidential Information]** estimate, the combined network will have **[Begin Confidential Information]**

[End Confidential Information] more cell sites than T-Mobile USA's standalone network and **[Begin Confidential Information]** **[End Confidential Information]** more cell sites than AT&T's. Hogg Reply Decl. ¶ 34. This integration will begin immediately after closing and continue on a rolling basis, with the combined company giving priority to areas currently suffering spectrum and capacity constraints and thus obtaining these capacity gains soonest in the areas that need them the most, including, for example, **[Begin Confidential Information]** **[End Confidential Information]**.

Hogg Decl. ¶¶ 44-46; Hogg Reply Decl. ¶ 35. The company expects to see service improvements in areas of various markets in as early as nine months, and it expects to complete this integration process on a national basis within twenty-four months. Hogg Decl. ¶ 44; Hogg Reply Decl. ¶ 35.⁶¹

Some merger opponents wrongly suggest that integration of a T-Mobile USA site will be of little value where both that site and the neighboring AT&T site are congested. *See, e.g.*, Public Knowledge at 53-54. But the opposite is true: cell splitting is especially valuable in such situations because it increases capacity. To take a simplified example, suppose two standalone networks each have 100 congested sites covering a particular area and the spectrum to handle 10 calls per site—each has the capacity to handle 1,000 calls, or 2,000 total for both networks. If the combined network were to retain 125 sites (i.e., engage in 25 cell splits), it could handle 20 calls per site (because of the combined spectrum) and have the capacity to handle a total of 2,500 calls. Thus, the total capacity served by those sites would increase by 25 percent just as a result of the increased cell density—and that would be true even if both networks were congested throughout that area.⁶²

⁶¹ Even apart from the capacity gains from cell splitting, the integration process will enable the combined company to choose the best sites from each pre-existing network and thereby create an even more optimized cell grid. For example, two close-by T-Mobile USA and AT&T cell-sites may have different antenna heights, and the combined company can choose to retain whichever cell-site has a more appropriate antenna height to optimize network performance. Reed/Tripathi Decl. at 12.

⁶² Of course, AT&T will have every incentive to retain all T-Mobile USA cell sites that could provide a meaningful capacity lift given the need for more capacity over both the short- and long-term. In any event, as the example demonstrates, the combined network will have greater capacity even if many T-Mobile USA sites are decommissioned. Hogg Reply Decl. ¶ 34.

Some opponents accuse AT&T of failing to provide sufficient detail to demonstrate that there will be T-Mobile USA sites that complement AT&T's network in areas where it faces capacity and spectrum constraints. They are incorrect. AT&T arrived at its estimate of at least **[Begin Confidential Information]** **[End Confidential Information]** integrated sites by matching up T-Mobile USA's grid against its own, and identifying potential sites for integration based on their distances from existing AT&T sites (while recognizing that sites closer than the distance criteria could well be integrated once a detailed engineering analysis is performed). Hogg Reply Decl. ¶ 32. Professor Reed and Dr. Tripathi describe these distance assumptions as "reasonable" and "likely conservative," noting that sites in high traffic areas could be good candidates for integration even if they were closer to existing AT&T sites than the assumptions used by AT&T. Reed/Tripathi Decl. at 10-11; Larsen Reply Decl. ¶ 11. As a result, they suggest, "AT&T may be able to incorporate even more T-Mobile cell sites into its network than currently estimated." Reed/Tripathi Decl. at 11.

As an engineering matter, there are sound reasons to expect that many of the T-Mobile USA sites that are candidates for integration based on their locations relative to existing AT&T sites will be in precisely those high-traffic areas where AT&T needs them the most. Reed/Tripathi Decl. at 11; Hogg Reply Decl. ¶¶ 31-32; Larsen Reply Decl. ¶¶ 11, 13. T-Mobile USA's network assets are more concentrated in highly populated urban areas than are AT&T's. Reed/Tripathi Decl. at 11. Moreover, because of the spectrum bands it uses and their propagation characteristics, T-Mobile USA's grid is significantly denser than AT&T's. *Id.*

AT&T has conducted a preliminary market analysis of downtown San Francisco and Washington, D.C. that compares the locations of existing AT&T and T-Mobile USA cell sites.

Hogg Reply Decl. ¶ 33. This analysis, which includes areas where AT&T is experiencing, or will be experiencing, peak load congestion issues, confirms that the T-Mobile USA sites are well-positioned to address AT&T's current and future spectrum and capacity constraints in these markets. *Id.* In the maps below of these areas, the blue circles indicate existing AT&T sites, and the pink dots within black squares are existing T-Mobile USA sites. As the maps show, T-Mobile USA has a large number of sites at complementary locations from which AT&T could choose to help relieve AT&T's current and future spectrum and capacity constraints and to help fill in gaps in AT&T's cell grid. AT&T's analysis, and a similar one performed by Professor Reed and Dr. Tripathi, provide further confirmation that a high proportion of T-Mobile USA sites are likely to be well-suited for retention and will give the combined company enormous flexibility in addressing network capacity issues.⁶³ *Id.* ¶ 33 & Ex. B; Reed/Tripathi Decl. at 11 (“The results of our analysis strongly confirm AT&T's distance-based metric for synergistic gains – a high proportion of the T-Mobile USA cell sites are well-located in and around the problem sectors.”); Larsen Reply Decl. ¶ 11.

[Begin Highly Confidential Information]

⁶³ Notably, American Tower has only *four* total sites in the area depicted in San Francisco. This further demonstrates the fallacy of opponents' assertion that AT&T could simply rely on existing third-party towers to address its capacity constraints. And it stands in stark contrast to the 25 to 35 percent increase in cell density that AT&T expects to achieve in San Francisco as a result of the transaction. Hogg Decl. ¶ 47.

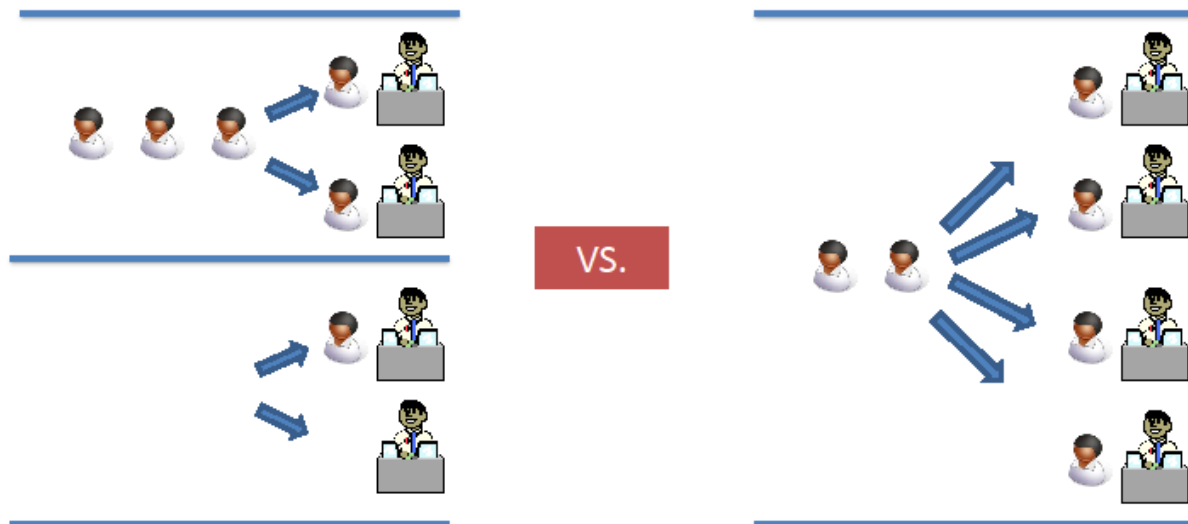
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[End Highly Confidential Information]

Redundant control channels. As explained in the Public Interest Statement, each company currently devotes 4.8 to 10 MHz of spectrum to “control channels” for its GSM services, depending on the market. Pub. Int. St. at 36. The transaction will enable the combined company to eliminate redundant control channels and promptly free up spectrum. Hogg Decl. ¶ 48; Reed/Tripathi Decl. at 13. Merger opponents do not seriously contest that the transaction will yield this efficiency. Free Press misses the point when it suggests that, because this efficiency is confined to GSM, it will have little value and be “moot” as users transition to newer technologies. Free Press Petition at 54-55. In fact, the spectrum that no longer needs to be devoted to control channels not only can be used to improve the quality of GSM service in congested areas, but can also be re-deployed and used more efficiently on the combined company’s UMTS networks (and subsequently for LTE). Reed/Tripathi Decl. at 14 (“[T]he merger’s elimination of redundant control channels should free up significant spectrum, in many cases enough to permit immediate redeployment of that spectrum for UMTS.”). Thus, this efficiency is highly valuable today and will remain so over time. And, because each company standing alone would need to keep its own control channels, the combined company’s ability to eliminate redundant control channels is another way in which the transaction will give it substantially more capacity than the sum of the capacities of the standalone companies.

Channel pooling efficiencies. As described in the Public Interest Statement, this transaction will enable the two networks to group their respective GSM spectrum channels into larger pools (and to do the same with UMTS channels once the combined company begins

serving all UMTS subscribers in a given area over the same frequency bands). Pub. Int. St. at 37-39. Because larger pools increase the statistical probability of obtaining an open channel, the transaction will enable the combined network to serve more subscriber traffic with the same aggregate spectrum than the two could serve independently, which will allow it to reduce blocked calls or free up spectrum for redeployment to more spectrally efficient technologies. Hogg Decl. ¶¶ 49-53. By analogy, an airport can serve more customers more quickly if it creates one ticket counter with four ticket agents rather than two distant counters with two agents apiece (Pub. Int. St. at 37):



As Professor Reed and Dr. Tripathi confirm, AT&T’s estimate that this efficiency alone will increase GSM capacity by 10 to 15 percent in both large and small markets is “entirely reasonable.” Reed/Tripathi Decl. at 20; *see also* Hogg Decl. ¶ 50.

Although merger opponents cannot deny the benefits of channel pooling, they again attempt to minimize the efficiency as allegedly applying only to voice services on the GSM network. Sprint Petition at 112-13. That is both wrong and again misses the point. It is wrong

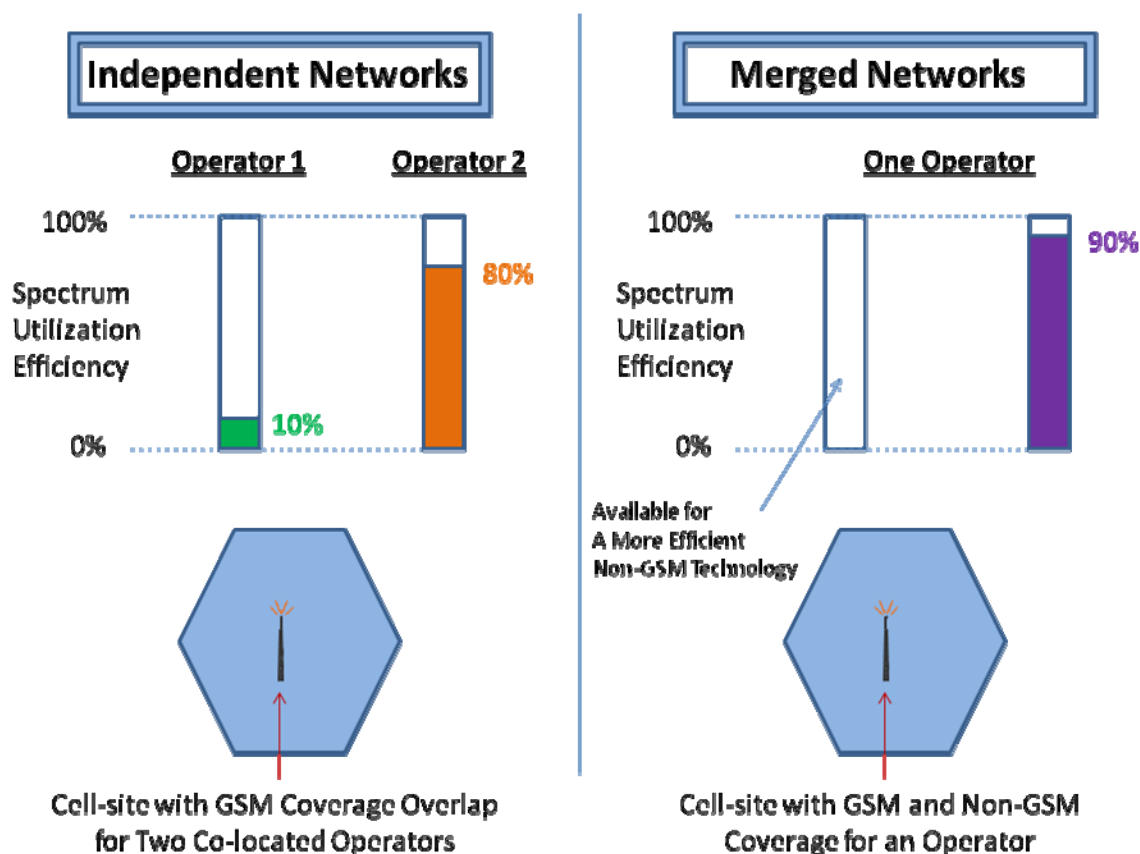
because the channel pooling efficiency will also apply to the EDGE data components of AT&T's GSM network. Reed/Tripathi Decl. at 20. And it misses the mark because, by enabling AT&T to provide GSM services more efficiently, channel pooling will free up spectrum that can be shifted to newer, more spectrally efficient technologies. *Id.* Indeed, because the 10 to 15 percent estimated increase in GSM capacity does not include the much greater *network-wide* efficiencies that channel pooling will create, it understates the likely capacity gains.

Finally, although some merger opponents suggest otherwise,⁶⁴ channel pooling results in efficiencies even where both networks are heavily loaded. Reed/Tripathi Decl. at 18; Hogg Decl. ¶ 52. Channel pooling increases the likelihood that customers will obtain an open channel without undue delay and therefore decreases the chance of a blocked or dropped call. Because even two networks that are heavily loaded are unlikely to experience peak traffic loads at the exact same times and the exact same places (e.g., due to factors such as differences in customer profiles or sheer randomness), the combined network can accommodate more subscribers with the same probability of blocking. Reed/Tripathi Decl. at 18.

Utilization efficiencies. The transaction will enable the combined company to make more efficient use of “spare” capacity in areas where one company’s network is underutilized, driving improvements in both performance and capacity in those areas. Pub. Int. St. at 39-40. For example, in a market like **[Begin Confidential Information]** **[End Confidential Information]**—where AT&T’s GSM network is congested, while T-Mobile USA’s is underutilized—the combined company could use spectrum in T-Mobile USA’s network to relieve that congestion. Hogg Decl. ¶¶ 54-55; Reed/Tripathi Decl. at 21-24.

⁶⁴ See, e.g., Sprint Petition at 114-15; Free Press Petition at 55-56.

Alternatively, in a market where T-Mobile USA's GSM network is underutilized and AT&T is facing congestion in its UMTS network but not its GSM network, the combined company can clear some or all of T-Mobile USA's GSM spectrum by moving customers to AT&T's GSM network and then redeploy that T-Mobile USA spectrum for more spectrally efficient UMTS service to relieve AT&T's UMTS congestion. *Id.* The figure below (*id.* at 23) illustrates this utilization efficiency:



Here, too, merger opponents do not contest the engineering underpinnings of utilization efficiency, but they express doubt that these efficiencies will arise in many markets because both companies' networks suffer from capacity constraints. Free Press Petition at 56-57; Sprint Petition at 114. But even if, in a given market, both networks *on average* are heavily loaded,

there likely will be significant variation in their loadings in particular sectors that will enable utilization efficiencies. For example, if one provider suffers from congestion in a particular location within a market and the second does not, then utilization efficiencies from combining the two companies' spectrum will help relieve congestion in that location—even if the second provider confronts congestion in other areas of the same market. Reed/Tripathi Decl. at 26. Additionally, utilization efficiencies will accrue over time even when both providers' networks are heavily loaded today. To take a simple example, suppose each carrier's network uses 10 MHz for GSM and is 75 percent loaded. In order to free up the 10 MHz needed for a UMTS carrier, *all* the customers on one of the separate networks would have to migrate off of GSM service. By contrast, the combined company would have 10 MHz of free spectrum that it could redeploy once more than one-third of the total customers migrated from GSM.⁶⁵

Additional spectrum for spectrally efficient LTE services. As explained in the Public Interest Statement, the transaction will accelerate the transition to more spectrally efficient LTE technologies for more subscribers, thereby increasing network capacity and more efficiently using scarce spectrum resources. Pub. Int. St. at 40-41. Over time, the transaction will enable the combined company to transition T-Mobile USA's HSPA subscribers off of its AWS spectrum in many markets and devote that spectrum to the deployment of LTE service that is 30 to 40 percent more spectrally efficient. Hogg Decl. ¶ 56. Moreover, in some CMAs, including [Begin Confidential Information] [End Confidential Information], T-

⁶⁵ The combined company would have 20 MHz of spectrum and be 75 percent loaded; once that load was reduced to under 50 percent—that is, by one-third—the company would have 10 MHz of spectrum free to redeploy.

Mobile USA holds spectrum that it has not deployed for UMTS service, and the combined company can re-purpose that spectrum for LTE without having to migrate HSPA customers. *Id.*

The combined company will be able to offer LTE in some markets where neither company would have offered it separately. Hogg Decl. ¶ 60. Moreover, as described above, this transaction will provide a clear path for migrating T-Mobile USA's 34 million customers to more efficient LTE services, thereby enabling the combined company to expand output still further.

Merger opponents acknowledge the spectral efficiency benefits of LTE, but they assert that there is little additional benefit to deploying LTE using 20 MHz of spectrum (i.e., in a 2X10 configuration) instead of 10 MHz (i.e., 2X5), noting that some carriers, such as MetroPCS, are deploying LTE with 10 MHz or less. *See, e.g.,* Sprint Petition at 127. Yet as Professor Reed and Dr. Tripathi and Deutsche Telekom's Larsen confirm, it is indisputable that a 20 MHz LTE deployment is more spectrally efficient (and therefore improves overall capacity) and provides greater throughput speeds per sector. Reed/Tripathi Decl. at 30; Larsen Reply Decl. ¶ 16; Hogg Decl. ¶ 25.⁶⁶

Some opponents assert that AT&T does not need T-Mobile USA's spectrum for LTE because AT&T could just re-purpose its 850 MHz or 1900 MHz spectrum for LTE instead.

Although AT&T will *eventually* be able to re-purpose that spectrum for LTE (assuming capacity

⁶⁶ In any case, MetroPCS occupies a different position from AT&T for these purposes. In particular, MetroPCS has no 3G offering comparable to UMTS/HSPA+, and thus its jump directly to LTE services even with 10 MHz has resulted in significant gains in speed and spectral efficiency over its prior service offerings. Letter from Carl W. Northrop, Counsel to MetroPCS, to Julius Genachowski, Chairman, FCC, GN Docket 09-91, WC Docket No. 07-52, at 3-4 (Feb. 14, 2011) ("MetroPCS then made the bold business decision to bypass a migration to EV-DO and to leapfrog from 1xRTT all the way to state-of-the-art fourth generation [LTE] services."). Moreover, MetroPCS has fewer subscribers than AT&T in most markets and accordingly needs less capacity.

exists), it cannot do so in the short- to medium-term. Among other obstacles, AT&T already faces significant capacity and spectrum constraints in many of those markets due to demand for its GSM and UMTS services, which use 850/1900 MHz spectrum, and thus it could not re-farm that spectrum without significantly degrading service to existing customers.⁶⁷ By contrast, as noted above, in a number of markets, T-Mobile USA has AWS spectrum that it has not yet deployed and thus could be used to supplement AT&T's spectrum holdings for LTE much more quickly.

b. Together, These Efficiencies Will Push Out Capacity Exhaust Dates and Bridge the Gap Until More Customers Migrate to LTE and Additional Spectrum Becomes Available Through Auction.

Various merger opponents question the overall significance and magnitude of the capacity gains AT&T will realize as a result of this transaction.⁶⁸ But the evidence shows that the transaction will enable the applicants to push out spectrum exhaust dates and bridge the gap to the time when sufficient numbers of customers have moved to more spectrally efficient LTE services, GSM service can be wound down, and the Commission has made more spectrum

⁶⁷ For the same reason, opponents are wrong in suggesting that AT&T does not need T-Mobile USA's spectrum to deploy LTE in rural areas. In fact, AT&T lacks sufficient capacity to meet demand even for existing services in many rural areas. For example, AT&T projects that between now and 2013, in **[Begin Confidential Information]** **[End Confidential Information]** rural service areas where it has already launched UMTS service, it will not have enough spectrum to deploy the additional carriers needed to meet demand. Hogg Reply Decl. ¶ 11. Further, in **[Begin Confidential Information]** **[End Confidential Information]** rural service areas, AT&T simply lacks the cellular or PCS spectrum to even launch and support UMTS service *at all* in one or more counties. *Id.* Indeed, as discussed below, the spectrum AT&T will obtain from T-Mobile USA in the transaction is part of the reason AT&T can commit to deploy LTE to an additional 17 percent of the U.S. population, many of whom are in rural areas. *See* Section I.B.1, *infra*.

⁶⁸ *See, e.g.,* Sprint Petition at 112-16; Free Press Petition at 54-58; Public Knowledge Petition at 49-54; NJ Rate Counsel Petition at 12.

available through auction. Hogg Decl. ¶ 11. Of course, as described above, the *precise* extent of network efficiency gains is unknowable at this point. Reed/Tripathi Decl. at 4. But it is eminently clear that those gains will be the functional equivalent of creating a significant amount of new capacity and that they will far exceed what AT&T could hope to achieve without this transaction.

As described above, established engineering principles and the real-world experience of the engineers running AT&T's network demonstrate that the transaction will enable AT&T to effectively *double* the capacity in the thousands of areas in which it can engage in cell-splitting due to the integration of T-Mobile USA's sites; free up significant capacity due to the elimination of redundant control channels that currently occupy 4.8 to 10 MHz of spectrum; increase capacity by another ten to fifteen percent as a result of channel pooling; and enable spectrum utilization efficiencies throughout the country, including in markets where AT&T confronts significant capacity constraints. Moreover, these gains will be multiplied on a network-wide basis as they permit AT&T to redeploy spectrum to more spectrally efficient technologies: for every MHz of spectrum that no longer needs to be used for GSM and can be redeployed for UMTS as a result of the synergies produced by the transaction, AT&T will not only gain that 1 MHz, but also will be able to use that 1 MHz with enormously greater efficiency. Hogg Decl. ¶ 25.

The conclusion that the transaction will produce significant capacity gains is reinforced by an analysis performed by Professor Carlton, using data and parameters supplied by Mr. Hogg. Carlton Reply Decl. ¶¶ 29-36; Hogg Reply Decl. ¶¶ 28-30. Professor Carlton calculated a quantitative estimate of some of the relative peak capacity gains from the merger (holding

quality constant) in fourteen geographic areas, both in the near-term after network integration and in the longer-term after expected increases in LTE deployment. Carlton Reply Decl. ¶¶ 30, 33. His results show enormous relative capacity gains—in some cases, more than 100 percent—in urban, suburban, and rural areas (even without taking into account certain efficiencies such as channel pooling and utilization efficiencies). *Id.* ¶¶ 34-35 & Tbl. 3.

Some opponents question whether the capacity gains will accrue quickly enough to be of any real benefit. *See, e.g.*, Sprint Petition at 116-17. But the combined company will achieve substantial gains just upon network integration. And, although it will take approximately two years to *complete* the network integration throughout the country, that integration will *begin* immediately after closing and will proceed on a rolling basis, so the combined company will be able to achieve efficiencies in many areas much sooner. For example, AT&T expects to integrate T-Mobile USA sites (and thereby achieve cell splits) in areas of some markets within approximately nine months, and it will target those areas facing the most urgent spectrum and capacity constraints for this initial work, including, for example, areas within markets such as

[Begin Confidential Information]

[End

Confidential Information]. Hogg Decl. ¶ 44; Hogg Reply Decl. ¶ 35.

In any event, even in markets where the combined company will face capacity constraints before it is able to fully achieve the network efficiencies made possible by this transaction, the transaction will enable the combined company to address those constraints much more quickly and much more effectively than AT&T otherwise could. For example, based on AT&T's 2010 build rate, it would take the standalone company more than eight years to add the number of cell sites it will have added by the completion of network integration in two years. Hogg Decl. ¶ 67.

And without this transaction, AT&T would not have access at all to the additional spectrum freed up by combining control channels, channel pooling, and utilization efficiencies. Blocking this transaction thus would succeed only in exacerbating the quality of service issues caused by AT&T's worsening capacity constraints—a result that competitors presumably desire, but that would harm consumers.

3. By Addressing Spectrum and Capacity Constraints and Making More Efficient Use of Spectrum, the Transaction Will Produce Significant Benefits for Consumers.

The capacity gains made possible by this transaction will enable the combined company to improve service quality in numerous respects. In addition, as Professor Carlton explains, “[t]he increase in the combined capacity of the AT&T and T-Mobile USA networks that will result from the proposed merger will lower the cost of serving additional subscribers and thus create incentives to expand output and lower prices relative to the levels expected in the absence of the transaction.” Carlton Decl. ¶ 134; *see also id.* ¶ 12. As he further describes, the increase in capacity produced by this transaction will generate an “‘automatic’ increase in output” because users are likely to make more calls and utilize more bandwidth-heavy applications such as video if they enjoy faster speeds and the prospect of fewer blocked and dropped calls. Carlton Reply Decl. ¶¶ 37-38. This “‘automatic increase’ in output” is reinforced by the structure of pricing for wireless services, which “typically does not depend directly on the volume of data used. As a result, an increase in utilization does not typically raise the marginal price of usage . . . [and instead] results in a decrease in the average price per megabyte utilized [T]he reduction in average price and increase in output resulting from the increase in service quality generate an unambiguous increase in consumer welfare.” *Id.* ¶ 38.

Merger opponents do not contest that this merger will enable the combined company to provide better service to millions of AT&T customers. Indeed, by increasing cell site density and taking other steps to alleviate AT&T's severe spectrum and capacity constraints, the transaction will enable AT&T to provide its GSM and UMTS customers with higher quality of service in the form of fewer dropped and blocked calls, better in-building and in-home coverage due to increased cell density, and faster, more consistent, and more reliable data services, particularly during periods of peak use. *See* Hogg Decl. ¶¶ 61-64. Moreover, by relieving spectrum constraints, this transaction will enable AT&T to devote more spectrum to LTE, which will provide customers with enormous benefits in terms of increased speeds and less latency.

The transaction will likewise benefit T-Mobile USA customers. As described above and in the Public Interest Statement, it will give those customers a path to LTE—and its attendant advantages in speed, latency, and other attributes—that they otherwise would not have. *See* Section I.A.3, *supra*. The merger's synergies also will result in significant service quality improvements for T-Mobile USA's customers. Customers in markets where T-Mobile USA faces (or will soon face) capacity constraints will receive improved service quality in the form of fewer dropped and blocked calls and faster speeds because, just as for AT&T customers, the merger will enable the combined company to relieve those capacity constraints. Hogg Reply Decl. ¶¶ 36-37.

Merger opponents speculate, however, that the transaction will degrade service quality for T-Mobile USA customers in markets where T-Mobile USA does *not* face capacity constraints because, they suggest, those customers will be served over AT&T's more crowded spectrum and network assets. But this claim ignores critical facts. First, for all the reasons described above,

combining the two networks will create new capacity, and that additional capacity will help relieve crowding on AT&T's spectrum in markets where it faces capacity constraints. Thus, the combined company's network will not suffer from the same capacity-related performance issues as does AT&T today. Hogg Reply Decl. ¶ 36.

Second, T-Mobile USA customers will receive demonstrable service quality benefits even if they live in a market where T-Mobile USA does not yet confront capacity constraints. For example, most T-Mobile USA GSM customers have handsets that will work on AT&T's GSM network. Access to AT&T's GSM network will provide T-Mobile USA subscribers with improved geographic coverage and superior in-building and in-home service. Hogg Decl. ¶ 57; Hogg Reply Decl. ¶ 38; Larsen Decl. ¶ 9; Larsen Reply Decl. ¶ 13. As T-Mobile USA's UMTS subscribers migrate to the AT&T network, they too will gain improved coverage, including more than *double* the geographic coverage they have today for UMTS services, as well as better in-building coverage. Hogg Decl. ¶ 57; Hogg Reply Decl. ¶ 38. These improvements in coverage are critical. For example, if customers cannot receive a signal and therefore cannot even get *on* a provider's network in the first place, all of the network's other performance characteristics are irrelevant to them. And T-Mobile USA's relative lack of coverage outside urban centers is a major issue for consumers: **[Begin Confidential Information]**

[End

Confidential Information]. Larsen Decl. ¶ 30.

Thus, as Deutsche Telekom's Larsen concludes, the combined company will be able "to achieve demonstrable service improvements for its subscribers that could not occur but for the transaction." Larsen Decl. ¶ 36. Indeed, AT&T has a proven track record of achieving such

service improvements. Hogg Reply Decl. ¶ 37. For example, following the Cingular/AT&T Wireless transaction and integration of the combined company’s network, dropped call rates for Cingular Wireless customers improved by an average of [Begin Confidential Information]

[End Confidential Information] and for AT&T Wireless customers by an average of [Begin Confidential Information] [End Confidential Information]. *Id.*

Finally, in addition to service-quality improvements, T-Mobile USA customers also will have access to a broader range of devices and additional rate plan options, as well as access to the nation’s largest network of Wi-Fi hotspots. Moore Decl. ¶¶ 10, 30.⁶⁹

Merger opponents wrongly posit that T-Mobile USA customers will have to pay higher AT&T prices or change devices in order to obtain many of these benefits. To the contrary, those customers will not have to make any changes to their T-Mobile USA services or devices upon the close of this transaction. Their handsets will continue to work,⁷⁰ and they will be free to remain on their current rate plans—even if they renew their contracts or exchange their existing handset for a comparable handset from AT&T’s device portfolio. Moore Decl. ¶ 30; Christopher Decl. ¶ 47; Christopher Reply Decl. ¶ 39. At the same time, the transaction gives them the highly valuable *option* to take advantage of more advanced service technologies (such as LTE), a broader range of devices, and additional rate plans if they choose to do so.

⁶⁹ RTG (at 5) speculates that the combined company will have worse customer care than T-Mobile USA. However, as it previously explained, AT&T will adopt the best practices of each company, and AT&T expects that customers of the combined company will benefit from T-Mobile USA’s industry-leading customer care practices. Pub. Int. St. at 43.

⁷⁰ Over time, in certain markets AT&T may decide it makes sense to “clear” the T-Mobile AWS spectrum of UMTS service so as to use it for LTE service, and in those cases T-Mobile USA customers will have to obtain new handsets to transition to LTE or to stay on UMTS using AT&T’s 850 MHz or 1900 MHz spectrum.

4. The Opponents Are Wrong To Assert That the Applicants Could Somehow Achieve Comparable Capacity Gains Through Alternative Measures.

Because they cannot seriously dispute that AT&T faces significant capacity constraints and that the merger will address those constraints, merger opponents devote much of their attack to claiming that AT&T could achieve similar capacity gains through alternative measures. They are wrong. As an initial matter, *not one of the alternatives they identify would enable AT&T on a standalone basis to eliminate control channels or achieve channel pooling or utilization efficiencies*, and opponents do not contend otherwise. Those efficiencies are produced as the result of integrating two networks. Only this transaction, not any of the alternatives identified by opponents, will produce the cumulative, unique efficiencies and capacity gains described above.

As to those alternatives, the short answer is that AT&T has pursued all reasonable measures at its disposal to address its spectrum and capacity constraints, including the various options to which opponents point. As merger opponents are fond of pointing out in other contexts, and Mr. Christopher discussed, the congestion AT&T has been experiencing on its network has **[Begin Confidential Information]**

[End Confidential Information].

Christopher Decl. ¶ 28 & n.57; Hogg Reply Decl. ¶ 48. Accordingly, addressing this congestion and improving service quality by expanding capacity and optimizing its network has been a top company priority since long before this transaction. Hogg Reply Decl. ¶ 49. If AT&T could have eliminated capacity constraints on its network using the alternatives cited by merger opponents, it would have done so. Surely, opponents are not suggesting that AT&T's network

engineers are somehow unaware of developments in cellular technology that could be used to address this problem.

In fact, AT&T has implemented the very alternatives opponents suggest. AT&T has been adding cell sites as quickly as it can identify suitable locations and bring those sites online; it has deployed the nation's largest Wi-Fi network and pioneered the use of Wi-Fi hotzones to offload traffic; and it has deployed about **[Begin Confidential Information]** **[End Confidential Information]** public DAS systems and hundreds of thousands of femtocells. Hogg Reply Decl. ¶ 52. But, as Mr. Hogg and Professor Reed and Dr. Tripathi explain, these and other measures, while useful in various contexts, are simply not—individually or collectively—an adequate solution to AT&T's systemic capacity and spectrum constraints. This merger, in contrast, will allow AT&T to achieve much greater capacity expansion than it could ever hope to realize through alternative strategies as a standalone company.

a. Adding Cell Sites or Leasing Them from a Standalone T-Mobile USA.

Merger opponents insist that AT&T could resolve its spectrum and capacity constraints by adding new cell sites on its own if only it would devote more resources to finding existing towers and other structures owned by tower companies and other parties.⁷¹ That is simply not true. As a threshold matter, even if AT&T on its own could add **[Begin Confidential Information]** **[End Confidential Information]** sites as it expects to do as a result of the transaction, that would yield none of the control channel, channel pooling, or utilization efficiencies of network integration. Hogg Reply Decl. ¶ 55. And, of course, AT&T would not get the benefit of the additional spectrum resources from T-Mobile USA. *Id.*

⁷¹ See, e.g., Sprint Petition at 106-09; AAI Comments at 24.

In any event, the evidence is clear that AT&T could not add anywhere close to **[Begin Confidential Information]** **[End Confidential Information]** sites on a remotely comparable timetable. Pub. Int. St. at 45-48; Hogg Decl. ¶¶ 67-72; Hogg Reply Decl. ¶ 55; Reed/Tripathi Decl. at 12. AT&T already has been aggressively adding new sites and, in fact, has over **[Begin Confidential Information]** **[End Confidential Information]** more cell sites than Verizon. Hogg Reply Decl. ¶ 56. Acquiring new cell site locations has been a top priority for AT&T's network engineering group, which has teams specifically devoted to identifying complementary cell site fits for AT&T's network. *Id.* ¶ 58. As part of that effort, AT&T works closely with tower companies, as well as other wireless providers that own towers, to identify suitable sites. *Id.* In fact, of the new sites added to AT&T's network in 2010, a **[Begin Confidential Information]** **[End Confidential Information]** were on existing facilities owned or built by tower companies or third parties, including **[Begin Confidential Information]** **[End Confidential Information]** on existing or new structures owned by American Tower. Hogg Reply Decl. ¶ 58.

But the reality is that in a highly developed network with an already dense grid in high-traffic areas, suitable towers or other structures must (1) meet stringent requirements for location, height, orientation, and lack of obstructions *and* (2) have space available for AT&T's equipment in addition to any other provider already using the structure. Hogg Reply Decl. ¶ 57. In particular, as cell density increases, the "search rings" for new site locations become progressively smaller, and it becomes increasingly difficult to find available locations where it is feasible to build new cell sites. Hogg Decl. ¶ 69; Reed/Tripathi Decl. at 9. Opponents thus engage in little more than fanciful speculation when they posit that there are significant numbers

of suitable towers or other existing structures just waiting for AT&T to find them. There are not. In many instances, third-party tower companies do not have towers that would address AT&T's capacity issues (e.g., because they lack space or are in the wrong location). Hogg Reply Decl.

¶ 58. Indeed, if AT&T could find appropriate locations for new cell sites as easily as opponents presume, it would have little reason to be deploying far more expensive solutions such as DAS systems to relieve capacity exhaust in localized, high traffic areas. *See* Carlton Reply Decl. ¶ 21 (DAS systems cost roughly seven times as much as a new cell site).

Even when AT&T is able to find suitable locations, it faces delays, costs, and obstacles beyond its control that are inherent in any such *ad hoc* process. The process for adding cell sites to an established grid is complex. AT&T must not only find a suitable and available location, but then arrange to acquire the site through purchase or lease, comply with regulatory requirements that necessitate extensive studies and consultation, apply for and obtain building permits and zoning approvals, contract with third-party vendors to purchase the needed equipment, construct the site, obtain the necessary backhaul, and then integrate the site into the network. Hogg Decl. ¶¶ 69-71; Hogg Reply Decl. ¶ 59; Reed/Tripathi Decl. at 9.

These steps individually and collectively take time, and AT&T cannot unilaterally accelerate many of them. The length of the zoning approval process, for example, depends on how quickly municipal regulators evaluate and approve new site applications. If anything, the pace of that process is slowing because local governments have fewer resources in these times of strained budgets and because the industry as a whole is in the midst of a building spree as providers deploy new LTE and WiMAX networks. Hogg Decl. ¶ 71. This building spree also limits the supply of engineering and other professional resources that are available to build or

modify sites. *Id.* Given these and other obstacles, AT&T could not, as a practical matter, add anywhere close to the [Begin Confidential Information] [End Confidential Information] sites it expects to integrate from T-Mobile USA's network on the timetable permitted by this transaction.⁷²

The opponents blithely suggest that AT&T could simply lease the thousands of T-Mobile USA sites it otherwise plans to integrate and add its equipment to them. That is incorrect. To begin with, T-Mobile USA owns the towers for less than one-seventh of its sites—about [Begin Confidential Information] [End Confidential Information]—and the large majority of its equipment is on towers, buildings, and other structures owned by various third parties. Hogg Reply Decl. ¶ 61. Thus, the large majority of T-Mobile USA's cell sites are no different than any other potential new sites and are subject to each of the key gating factors that generally apply, including the delays associated with actually coming to terms on an appropriate leasing arrangement. Moreover, as is the case with other existing sites, some T-Mobile USA sites are in locations such as flagpoles, power transmission lines, rooftops, church steeples, and other places that cannot accommodate another carrier's separate equipment due to space, weight, and other

⁷² Sprint's technical declarant provides no support for his claim that "industry averages for new site constructions are from six to twelve months for tower collocations and nine to eighteen months for rooftop installations or new tower sites." *See* Sprint Petition, Stravitz Decl. ¶ 26. That is certainly not AT&T's experience. And as Professor Reed and Dr. Tripathi and Deutsche Telekom's Larsen confirm from their experience, that time period represents a "rarely attainable 'best case.'" Reed/Tripathi Decl. at 12 & n.9; Larsen Reply Decl. ¶ 9 (such a period is a "very best case scenario"). Sprint's reference to Clearwire's alleged deployment of 10,000 sites in 2010 is inapt. Clearwire was deploying a new network in a "greenfield" situation and accordingly had far more flexibility in finding sites than an established carrier such as AT&T. Reed/Tripathi Decl. at 12 & n.9; Larsen Reply Decl. ¶ 10. Moreover, because the equipment Clearwire deployed required a smaller site, it could more easily and quickly obtain zoning and other permits. Larsen Reply Decl. ¶ 10.

limitations. *Id.* ¶¶ 58 & n.48, 61. Thus, as a practical matter, those sites would not be available for a standalone AT&T to lease.

In suggesting that AT&T could achieve the same cell density through leasing sites, opponents ignore the significant differences between (1) installing duplicative facilities onto a leased site for use with a second provider's separate network and (2) integrating a pre-existing site into the combined company's single network. The former approach is far less efficient than the latter. It requires complicated and time-consuming steps like those described above, such as conducting a structural analysis of the site, complying with regulatory requirements, obtaining zoning and other permits, effecting any necessary physical modifications to or augmentation of the site, installing the new antenna and equipment, and obtaining transport to the site. Hogg Reply Decl. ¶ 60. The latter approach, on the other hand, generally requires little more than switching out the existing antenna for a multi-band antenna and installing new electronics at the base (*e.g.*, to make the site suitable for LTE). *Id.* ¶ 55 & n.45.⁷³

These differences have significant real-world consequences. For example, the post-merger AT&T will be able to integrate a cell site in *much less time* than it would take AT&T, in the absence of this transaction, to lease space on that same site and make it operational for its own standalone network (in addition to T-Mobile USA's). Hogg Reply Decl. ¶¶ 55, 60-61. Not only will integration avoid the lengthy process for negotiating a lease, but it will also avoid a

⁷³ Because AT&T generally will replace T-Mobile USA's existing antennas and equipment with comparable equipment, zoning and regulatory approvals should be minimal. Hogg Reply Decl. ¶ 55 & n.45. Sprint speculates that T-Mobile USA sites might not be able to support the needed multi-band antennas because they will be bigger and weigh more. Sprint Petition, Stravitz Decl. ¶ 28. In fact, however, many of AT&T's multi-band antennas are similar in size to T-Mobile USA's existing antennas and thus generally should not present this concern. Hogg Reply Decl. ¶ 55 n.45.

full-blown zoning process that typically takes many months. That is why AT&T expects the combined company will be able to integrate approximately **[Begin Confidential Information]**

[End Confidential Information] sites in much less time than would be required in the absence of this transaction; indeed, as previously noted, adding that same number of sites would take much, much longer—about eight years based on AT&T’s 2010 rate.

The bottom line is that AT&T cannot solve its capacity and spectrum constraints through the ad hoc addition of new sites. But even if it could, that still would not be remotely as efficient or pro-consumer as the proposed transaction. As Commission staff has recognized, building cell sites to meet growing mobile demand is a highly inefficient solution that is far more costly than making new spectrum available.⁷⁴ Moreover, “it is very likely that these unnecessary costs will affect consumer prices if new spectrum is not made available. And, recognizing that there are likely to be exogenous limitations to the addition of new cell sites, mobile broadband service quality is also likely to suffer if new spectrum is not made available.”⁷⁵ Thus, opponents are effectively arguing that consumers should be denied the benefits of this merger—including efficiencies that will create the functional equivalent of new spectrum—so that AT&T can instead pursue an inefficient strategy that would cause consumers to pay more and suffer from worse service quality. That self-evidently would thwart the public interest.

⁷⁴ Federal Communications Commission, *FCC Technical Paper No. 6: Mobile Broadband: The Benefits of Additional Spectrum* at 20-21 (Oct. 2010), <http://download.broadband.gov/plan/fcc-staff-technical-paper-mobile-broadband-benefits-of-additional-spectrum.pdf> (“*FCC Technical Paper No. 6*”).

⁷⁵ *Id.* at 20.

b. “Heterogeneous Networks.”

Sprint and other merger opponents also assert that the parties could resolve their capacity problems by relying on a more “heterogeneous network,” including Wi-Fi, DAS, femtocells, software-defined radios, smart antennae, and the like. *See, e.g.*, Sprint Petition at 104-05. But AT&T’s network *is* heterogeneous today, and it aggressively relies on these technologies where they make sense. Hogg Reply Decl. ¶ 52. Yet AT&T still faces system-wide capacity and spectrum constraints. *Id.* ¶¶ 51-52.

AT&T uses Wi-Fi and DAS extensively today. Indeed, AT&T has the nation’s largest Wi-Fi network with more than 24,000 hotspots and is “[t]he only U.S. carrier that has actively pursued a Wi-Fi offloading strategy” through the deployment of 15 permanent Wi-Fi hotzones, with approximately **[Begin Confidential Information]** **[End Confidential Information]** more planned for this year.⁷⁶ But Wi-Fi deployments play a meaningful role for offloading traffic only in localized areas with high user densities. Hogg Reply Decl. ¶ 53; Reed/Tripathi Decl. at 32. DAS suffers from similar limitations. Although AT&T has deployed 1,800 public DAS systems,⁷⁷ and they are useful to provide additional capacity in localized areas much smaller than those served by a macro cell site, they too do not offer a solution to the broader capacity exhaust issues AT&T confronts. Hogg Reply Decl. ¶ 53; Reed/Tripathi Decl. at 32.

Nor, contrary to opponents’ claims, are femtocells an option for addressing capacity problems. AT&T has deployed over **[Begin Confidential Information]** **[End**

⁷⁶ Hogg Reply Decl. ¶ 52; *The Mobile Operators’ Love/Hate Relationship with Wi-Fi*, Voice Report (Apr. 29, 2011), [http://www.thevoicereport.com/2011-04-29/Mobile-Operator-WiFi;AT&T Broadband Services—Wi-Fi](http://www.thevoicereport.com/2011-04-29/Mobile-Operator-WiFi;AT&T%20Broadband%20Services—Wi-Fi), <http://www.att.com/gen/press-room?pid=7777>.

⁷⁷ Hogg Reply Decl. ¶ 52. AT&T has provided a list of its deployed DAS systems in response to the Commission’s data requests.

Confidential Information] femtocells throughout the country. Hogg Reply Decl. ¶ 52. But they are used to expand *coverage* in very localized areas like a home or office building that are on the fringe of the network's coverage area; they do not increase *capacity* or offload traffic from the macro network because users in such locations do not access the macro network in the areas served by the femtocell. *Id.* ¶ 54. Moreover, even if a user is in an area within the macro network's coverage, difficulties in handoffs between femtocells and the macro network reduce femtocells' effectiveness. *Id.*; Reed/Tripathi Decl. at 32.

Merger opponents' remaining kitchen-sink of suggestions also fails to offer a solution. AT&T already increases the number of sectors per site where appropriate. It has approximately **[Begin Confidential Information]** **[End Confidential Information]** three-to-six sector splits in progress for 2011 and another approximately **[Begin Confidential Information]** **[End Confidential Information]** currently planned for 2012. Hogg Reply Decl. ¶ 52. But this technique is workable only in certain situations and can give rise to interference issues. *Id.* ¶ 52 & n.45; Reed/Tripathi Decl. at 33. Technologies such as MIMO (multiple-input and multiple-output) and smart antennae are optimized for LTE networks and thus have not been adopted widely for 3G networks. Reed/Tripathi Decl. at 33. Moreover, they too are of use only in limited situations, namely in dense urban areas with many buildings, and are not a mechanism for relieving spectrum exhaust on AT&T's GSM and UMTS networks. *Id.* Finally, software-defined radios—while useful for some purposes and deployed by all carriers including AT&T—do not provide capacity gains. *Id.* at 34. Rather, they produce the very *same* radio signals as hardware-defined radios. *Id.*

c. Network Sharing or Data Roaming.

Various opponents suggest that AT&T could address its spectrum and capacity constraints by entering into commercial arrangements short of a merger. Some suggest that AT&T enter into data roaming agreements. *See, e.g.*, Free Press Petition at 62; Public Knowledge Petition at 60. Others assert that AT&T should enter into a “network sharing” arrangement. *See, e.g.*, RTG Petition at 11-13. But such arrangements could not possibly produce capacity-expanding efficiencies comparable to this transaction. For example, channel-pooling efficiencies and elimination of redundant control channels require the integration of two networks, not an arms-length commercial “arrangement” between two separate providers. Hogg Reply Decl. ¶ 65. Moreover, a data roaming agreement could not provide AT&T with offload of UMTS traffic: as a GSM carrier, AT&T cannot obtain roaming from CDMA/EvDO providers such as Verizon, Sprint, and others, and its subscribers’ handsets do not work on the AWS spectrum that T-Mobile USA uses for UMTS service.

RTG offers no details concerning its alternative of network sharing, but it is clear that any close intertwining of two networks would raise complex governance and network-planning issues. Hogg Reply Decl. ¶ 66. For example, because AT&T will be deploying LTE in many markets, while T-Mobile USA lacks a clear path to LTE, AT&T would have an interest in making network changes needed for its LTE deployment (e.g., installing new antennas), while T-Mobile USA would not. *Id.* Almost inevitably, those decisions would not fully reflect the interests and needs of both providers and their customers. *Id.* One provider could, for example, lower prices for unlimited data plans and induce a flood of new traffic, which would burden the “shared” network and harm the other provider’s customers. To avoid such scenarios, the two

providers would have to coordinate so closely that they would be significantly constrained in their ability to compete with each other and other providers in the marketplace.

d. Adding Spectrum Through Purchase or Lease.

Merger opponents also blithely assert that the applicants should simply purchase or lease spectrum in areas where they face capacity challenges. *See, e.g.*, Sprint Petition at 109-10. But they never grapple with the severe limitations of that approach. *See* Pub. Int. St. at 50-51. Acquiring additional spectrum on a spot basis is not a feasible means of addressing AT&T's larger capacity problem. Although AT&T has acquired spectrum on a piecemeal basis in particular markets, such spectrum becomes available only episodically and only in some locations—which may or may not be where AT&T needs spectrum. Moore Decl. ¶¶ 23-24. Moreover, spectrum on the secondary market is useful in alleviating capacity constraints for AT&T's GSM and UMTS services only if it occupies the 850 MHz or 1900 MHz bands with which existing customers' handsets are compatible. Hogg Decl. ¶ 16 n.4. In short, spectrum on the secondary market is a potential solution only when it is available in the right place, at the right time, and in the right frequency bands. Spectrum meeting these conditions is not often available. Moore Decl. ¶ 22.

For similar reasons, spectrum leased from wholesale providers such as Clearwire or LightSquared cannot address AT&T's mounting capacity constraints. Among other limitations, AT&T (like T-Mobile USA) has a large embedded base of subscribers whose existing handsets would not work on those providers' spectrum bands or with their technologies. As a result, while Clearwire or LightSquared spectrum may well offer reasonable solutions for carriers like MetroPCS or Leap because they do not face similar constraints, AT&T needs additional

spectrum to relieve congestion on its *existing* service bands, which serve millions of current customers.

5. The Transaction Will Also Create Enormous Cost Savings.

There is virtually no dispute in the record that this transaction will generate tens of billions of dollars in cost savings. Using a standard discounted cash flow methodology, AT&T projects these savings will exceed \$39 billion, with an annual run rate exceeding \$3 billion starting the third year after closing. Moore Decl. ¶ 32. As detailed in the declaration of Rick Moore, AT&T's Senior Vice President of Corporate Development, the cost savings will come primarily from combining the AT&T and T-Mobile USA networks; reductions in customer-acquisition costs; savings in network infrastructure investment and equipment purchases; and savings in customer-support and general and administrative costs. *Id.* ¶¶ 34-37. These are precisely the sorts of synergies that the Commission has credited before as furthering the public interest.⁷⁸

The only challenge merger opponents make to these savings is a claim by one commenter that they are “unsubstantiated.” AAI Comments at 27-28. But the projected costs savings were developed using the same discounted cash flow methodology that AT&T has used in estimating

⁷⁸ See, e.g., Memorandum Opinion and Order, *Applications Nextel Commc'ns, Inc. and Sprint Corporation for Consent to Transfer Control of Licenses and Authorizations*, 20 FCC Rcd 13967, 14016-17 ¶¶ 137-38 (2005) (“*Sprint/Nextel Order*”) (crediting “significant savings by merging ... billing, customer care, sales, and marketing systems” and reduced capital expenses); Memorandum Opinion and Order, *Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, 20 FCC Rcd 18433, 18535 ¶ 208 (2005) (“*Verizon/MCI Order*”) (crediting the “elimination of duplicative network facilities, staff, and information and operations systems”); Memorandum Opinion and Order, *Applications of SBC Communications Inc. and Bellsouth Corporation for Consent to Transfer of Control or Assignment of Licenses and Authorizations*, 15 FCC Rcd 25459, 25480-81 ¶¶ 47-48 (WTB/IB, 2000) (“*SBC/BellSouth Order*”) (crediting consolidated national advertising, reduced customer-service and billing costs, and marketing costs spread over a larger network and subscriber base).

synergies for prior transactions, and the Commission has long recognized that such a methodology is “standard.”⁷⁹ AT&T’s methodology here was further informed by its more recent experience with other transactions and integration efforts, in which it has a proven track record of successfully obtaining cost savings. Moore Decl. ¶¶ 39-41.

Finally, the suggestion that savings with respect to “fixed” costs should be disregarded (AAI Comments at 25-26) ignores the economic reality of this industry. As Professor Carlton explains, the accounting distinction between “fixed” and “variable” costs is not meaningful in a context in which firms are operating near capacity in many areas and facing high costs of expanding output, as is the case with Applicants. Carlton Decl. ¶ 67. Synergies that reduce the cost of expanding output will in turn increase the combined company’s incentives to expand output, which will benefit consumers. *Id.* ¶¶ 67-68.

B. The Transaction Will Strongly Promote the Nation’s Broadband Deployment and Other Key Policy Goals.

1. The Transaction Will Enable the Combined Company To Deploy LTE to over 97 Percent of Americans Without Public Funding.

Both President Obama and the Commission have emphasized the strategic importance of broadband to America’s economy and security and placed a high priority on widespread broadband availability. Because of the spectrum, scale, and other resources resulting from this transaction, AT&T commits that, consistent with those critical national priorities, it will deploy LTE within six years after closing to over 97 percent of Americans—*55 million* more Americans than AT&T’s pre-merger plans. This initiative, which includes many rural areas and

⁷⁹ Moore Decl. ¶ 33; *see GM/Hughes Order*, 19 FCC Rcd at 567 ¶ 206 n.587 (“The discounted cash flow analysis is . . . the standard method for comparing flows of costs and benefits that vary temporally.”).

underserved communities, will expand AT&T's pre-merger LTE coverage by more than one million square miles, from less than 20 percent of the U.S. land mass to approximately 55 percent post-merger. Hogg Reply Decl. ¶ 40. Significantly, AT&T will fund this LTE expansion entirely from private capital, without any universal service support or other public subsidy.⁸⁰ In this time of severe budget constraints, a privately funded initiative to bring advanced mobile broadband wireless services to tens of millions of Americans who need it most—and who might not otherwise receive it—is an especially significant public interest benefit that weighs heavily in favor of the merger.⁸¹

This increased LTE deployment will help bridge the digital divide.⁸² Just last month, the Commission observed in its broadband progress report that “lack of access to broadband is

⁸⁰ Testimony of Randall L. Stephenson, Hearing of the Antitrust, Competition Policy and Consumer Rights Subcommittee of the Senate Judiciary Committee, *The AT&T/T-Mobile Merger: Is Humpty Dumpty Being Put Back Together Again?* (May 11, 2011).

⁸¹ See, e.g., Memorandum Opinion and Order and Declaratory Ruling, *Applications of Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC for Consent to Transfer Control of Licenses, Authorizations, and Spectrum Manager and De Facto Transfer Leasing Arrangements*, 23 FCC Rcd 17444, 17498-512 ¶¶ 122-146, 196-201 (2008) (crediting Verizon's plans to extend its network into unserved areas; increase broadband deployment and next generation services, including LTE, particularly in rural areas; and provide higher-quality service) (“*Verizon/Alltel Order*”); Memorandum Opinion and Order, *Applications Filed by Frontier Communications Corporation and Verizon Communications Inc. for Assignment or Transfer of Control*, 25 FCC Rcd 5972, 5992-93 ¶¶ 50, 52, Appdx. C, D (2010) (crediting commitments with respect to broadband deployment and improved service in rural areas); Memorandum Opinion and Order, *AT&T, Inc. and BellSouth Corporation Application for Transfer of Control*, 22 FCC Rcd 5662, 5762, 5807 ¶ 204, Appdx. F (2007) (“*AT&T/BellSouth Order*”) (crediting commitments to accelerate broadband deployment).

⁸² See, e.g., Statement of Rep. Heath Shuler (NC-11) (Mar. 23, 2011) (“[T]oo many homes and small businesses in Western North Carolina, and rural communities across the country, lack the access they need. I believe this deal will help close that digital divide, allowing for the growth of small business and job creation no matter where a community is on a map.”); Letter from Cuban American National Council, at 2 (May 17, 2011) (“The benefits of this merger to the consumer, especially Latinos, are incredibly significant and would go a long way to erase the

particularly pronounced” for certain groups, including minorities and rural inhabitants.⁸³ As Commissioner Copps emphasized in connection with the report, “we simply cannot afford to have millions of our fellow citizens on the wrong side of the digital divide.”⁸⁴ AT&T’s LTE commitment will especially help address that gap.

LTE services will deliver higher speeds and much-reduced latency, and will enable a vast array of new interactive wireless services that have the potential to transform how rural Americans live, work, and play. Donovan Decl. ¶¶ 29, 50-52. Because of the merger, consumers and businesses located in rural America will have access to the *same* next generation technology being deployed in major cities.⁸⁵ *Id.* This will enable local communities to develop

digital divide.”); Letter from Kasim Reed, Mayor, City of Atlanta (May 18, 2011) (“[T]his merger has great potential of significantly reducing the economic and technological barriers that exist in underserved, rural and low-income urban areas.”).

⁸³ Seventh Broadband Progress Report and Order on Reconsideration, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, GN Docket No. 10-159, FCC 11-78 ¶¶ 4, 51, 66 (released May 20, 2011) (“*FCC Broadband Report*”).

⁸⁴ *Id.* at 92 (Statement of Commissioner Copps).

⁸⁵ For example, the National Grange has stated that the transaction “gives great hope to residents in rural communities across America that are currently lacking access to advanced wireless broadband connections by expanding wireless coverage into previously uncovered areas.” Letter from Ed Luttrell, President, National Grange, at 1 (May 3, 2011). The West Virginia Farm Bureau notes that “[t]o competitively manage a farm, wireless technology is now a necessity” and that AT&T’s increased broadband deployment will “spur[] job creation and provide[] people with increased economic advantages as well as educational and professional opportunities.” Letter from Charles Wilfong, President, West Virginia Farm Bureau, at 1 (undated). The Asian & Pacific Islander American Health Forum states that “we believe that the acquisition absolutely serves the best interests of Asian American, Native Hawaiians and Pacific Islander communities. In light of the looming spectrum crisis, our communities now, more than ever, see the need to support both the growth and efficient use of spectrum offered by this merger. The continued technological development this would foster is crucial to the advancements in tele-health that many in our communities so desperately depend on.” Letter

infrastructure and overcome the difficulties of distance—creating businesses and jobs, facilitating entrepreneurship, and integrating rural America much more closely into the broader American economy. Rural customers will also benefit because LTE will support revolutionary new capabilities like cloud computing, which will give wireless consumers access to far greater computing power and data storage from handsets that are thinner, lighter, and have much longer battery life. Donovan Decl. ¶¶ 30-32. These service innovations will create new rural information infrastructure, thereby improving education, health care,⁸⁶ and public safety,⁸⁷ stimulating new commercial activities, and creating jobs. *Id.* ¶¶ 32, 50-52.

from Kathy Lim Ko, President, APIAHF (May 23, 2011). The U.S. Distance Learning Association has noted: “[t]his transaction will enable more Americans to realize the benefits of distance learning through wireless devices, mobile apps, and other related educational tools and promises to . . . help us to accomplish our mission.” Statement of U.S. Distance Learning, at 1 (Apr. 27, 2011). The Sierra Club stated “[e]xpansion of broadband technologies to rural America [as AT&T has committed to do] brings a vital 21st century infrastructure to all our communities and will conserve energy by eliminating carbon emission . . . and promote other efficiencies through smart grids and smart meters accessed through broadband.” Statement of Michael Brune, Executive Director, Sierra Club (May 25, 2011).

⁸⁶ These benefits have been recognized by numerous health care organizations. For example, the National Rural Health Association has stated that “[h]igh-speed wireless access is the most ground-breaking development for rural health in decades The merger of AT&T and T-Mobile will . . . bring state of the art technology to rural areas, enabling the use of sophisticated eHealth applications that rely on video conferencing and real time interaction.” Letter from Alan Morgan, Chief Executive Officer, National Rural Health Association, at 1 (May 18, 2011). Gregory Dent of the Macon Community Health Works noted that “[w]e can overcome this problem (the inability of rural patients to afford the costs of getting to medical care) by connecting specialists with general practitioners in our area via video, voice and data connections. Not only can physicians and other health care professionals consult, but they can share test results and even video appointments with patients. The proposed merger between AT&T and T-Mobile will greatly help make these connections by delivering ultra-fast wireless access to all parts of our state.” Letter from Gregory Dent, President, Community Health Works, Macon, GA (May 18, 2011).

⁸⁷ Public safety organizations that have filed letters in support of the merger include the Professional Firefighters of New Hampshire, the Lincoln California Police Department, the

AT&T's broader LTE deployment also will help expand opportunities for low income and minority communities. Research has shown that African Americans and Hispanics are among the most active users of the mobile Internet and the fastest growing group of users. Pub. Int. St. at 59-60. Having next generation wireless services readily and broadly available ensures that these communities too can participate in the wireless broadband revolution. These benefits are why the merger has drawn support from the NAACP, the Hispanic Institute, the Minority Media and Telecommunications Council, Pride at Work, and numerous other civil rights organizations.⁸⁸

Merger opponents cannot deny the myriad public benefits of broader LTE deployment, so they are left to claim that AT&T would deploy LTE to more than 97 percent of the U.S. population even in the absence of the transaction.⁸⁹ Those allegations are based on nothing more than conjecture, and they are wrong.

Sacramento Fire Department, the West Sacramento Police Department, the Kern County Fire Fighters, the City of Placerville Police Department, and the Arkansas Attorney General.

⁸⁸ Pub. Int. St. at 59-61 & n.65; Amicus Comments of the Minority Media and Telecommunications Council in Support of the AT&T/T-Mobile Merger (May 30, 2011); Statement of Pride at Work (undated). Among other minority group supporters of this transaction are the 100 Black Men of America, Inc., National Black Farmers Association, The Latino Coalition, Women Impacting Public Policy, World Institute on Disability, Alliance for Digital Equality, Consumer Awareness Project, the United States Distance Learning Association, the National Association of Black County Officials, the National Black Chamber of Commerce, the National Organization of Black Elected Legislative Women, the National Conference of Black Mayors, the Cuban American National Counsel, the National Action Network, the National Association for Equal Opportunity in Higher Education, the National Coalition on Black Civic Participation, the Hispanic Technology & Telecommunications Partnership, the Dominican American National Foundation, the Hispanic Leadership Fund, and the Urban Leagues of Cleveland, Columbia, Metropolitan Denver, Greater New Orleans, Metropolitan St. Louis, Portland, Oregon, and San Diego.

⁸⁹ See, e.g., Sprint Petition at 129; Leap Petition at 31; Free Press Petition at 41-42.

The Commission has recognized that “[i]n areas with low population density . . . [broadband] deployment is often uneconomical, as the costs to build a network exceed potential revenues.”⁹⁰ Prior to this transaction, that is what AT&T senior management concluded when, in January 2010, and again in January 2011, they decided that an LTE footprint covering more than 80 percent of the U.S. population could not be justified. There was good reason for this. Going from 80 to over 97 percent will require AT&T to nearly triple the land mass covered by its LTE network, from below 20 percent to approximately 55 percent. Hogg Reply Decl. ¶ 40. It takes nearly double the capital expenditures per covered person to provide mobile wireless service in sparsely populated areas as compared to densely populated areas, and AT&T estimates that this expansion will require approximately **[Begin Confidential Information]** **[End Confidential Information]** in additional capital expenditures. *Id.* After considering the

⁹⁰ *FCC Broadband Report* ¶ 66; *see also* Federal Communications Commission, *Connecting America: The National Broadband Plan*, at 136 (2010), <http://download.broadband.gov/plan/national-broadbandplan.pdf> (“*National Broadband Plan*”) (noting that “because service providers in [rural] areas cannot earn enough revenue to cover the costs of deploying and operating broadband networks, included expected returns on capital, there is no business case to offer broadband services in these areas”); Omnibus Broadband Initiative, Technical Paper No. 2 – *A Broadband Network Cost Model: A Basis for Public Funding Essential to Bringing Nationwide Interoperable Communications to America’s First Responders*, at 5 (May 2010) (noting that “[i]n suburban and rural America, however, new site acquisition, zoning and construction [costs] will in general be substantively higher” than in urban areas); FCC – Acting Chairman Michael C. Copps, *Bringing Broadband to Rural America: Report on a Rural Broadband Strategy*, ¶ 50 (released May 22, 2009), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-291012A1.pdf (noting that “prohibitively high deployment costs . . . plague many rural areas”); *id.* at ¶ 113 (“rural networks can often be even more expensive to deploy and potentially more expensive to maintain than networks in non-rural areas for a variety of reasons, which can serve as a formidable barrier to rural broadband deployment.”); GAO, *Broadband Deployment Is Extensive throughout the United States, but It Is Difficult to Assess the Extent of Deployment Gaps in Rural Areas*, GAO 06-426, at 19-20 (May 5, 2006), <http://www.gao.gov/new.items/d06426.pdf> (noting that the results from the GAO’s econometric model confirm that “the cost of building a broadband infrastructure in areas where people live farther apart is much higher than building infrastructure to serve the same number of people in a more urban setting”).

marketing benefits of expanded LTE deployment, including competitive considerations, as well as the fact that AT&T already will deploy HSPA+ 4G service to 97 percent of the population by the end of 2012, AT&T concluded that an 80 percent deployment was as much as could be justified on a standalone basis. *Id.*

The merger alters this calculus in important respects, giving AT&T additional spectrum, scale, scope, and resources that collectively enable AT&T to commit to increase its LTE deployment from 80 to 97 percent of the population. Moore Decl. ¶¶ 14-15; Hogg Reply Decl. ¶ 41. One key benefit is additional AWS spectrum that can be used for LTE in the incremental build area.⁹¹ Hogg Reply Decl. ¶ 41. For example, in approximately [Begin Confidential Information] [End Confidential Information] CMAs (with about [Begin Confidential Information] [End Confidential Information] people), AT&T currently does not have 700 MHz or AWS spectrum but will obtain AWS spectrum from T-Mobile USA. *Id.* ¶ 42. In another approximately [Begin Confidential Information] [End Confidential Information] CMAs covering nearly [Begin Confidential Information] [End Confidential Information] people, the merger also will supplement AT&T's thin 700 MHz and AWS spectrum holdings so that it holds an average of 20 MHz of AWS spectrum for LTE. *Id.* ¶ 43.

Because of these spectrum gains and the overall economic benefits resulting from the transaction, AT&T's senior management made a business judgment that the merger with T-

⁹¹ Some opponents claim that AT&T does not need additional spectrum for LTE deployment because it could redeploy its existing 850 MHz and 1900 MHz spectrum instead. *See, e.g.,* Sprint Petition at 126. However, as explained above, although AT&T might eventually be able to use that spectrum for LTE if sufficient capacity exists, it could not do so in the short to medium term. *See supra* Section I.A.2.

Mobile USA allowed AT&T to expand its LTE build-out to 97 percent of the population. Hogg Reply Decl. ¶ 45. These economic benefits include incremental reductions in cost due to the addition of T-Mobile USA resources, greater scale economies (such as higher volume discounts on handsets and equipment), a larger customer base, and the expectation of a higher take-rate for its LTE service. *Id.* In addition, the transaction will enable AT&T to repurpose its existing capital budget allocated to spectrum acquisitions to be allocated for other uses. *Id.* Overall, the scale and scope of the larger combined wireless business will permit the additional capital investment to be spread over a larger revenue base than would be the case absent the merger. *Id.* At bottom, AT&T’s management concluded that, because the merger with T-Mobile USA results in greater revenues, customers, and overall scale, AT&T could better absorb the capital investments and lower returns associated with building out its LTE network to cover over 97 percent of the U.S. population. *Id.* ¶ 46.

Some merger opponents contend that AT&T would be compelled to reach 97 percent LTE deployment (or something comparable) in light of Verizon’s announced plans to deploy LTE across its current 3G footprint.⁹² But AT&T’s business decision not to deploy LTE to 97 percent of the population on a standalone basis already took account of such competitive

⁹² See, e.g., Sprint Petition at 129; Leap Petition at 31; Media Justice Petition at 38; Free Press Petition at 41-42. Free Press claims that “AT&T has previously indicated its intention to reach at least 87 percent of the population with LTE,” citing a 2009 statement from AT&T Mobility’s CEO. Free Press Petition at 41. But the actual statement indicated that AT&T “would be using our 700 megahertz and AWS spectrum exclusively for LTE. *This spectrum will cover 100% of the top 200 markets and 87% of the US population.*” Conference Call Tr., Q3 2009 AT&T Earnings, Seeking Alpha (Oct. 22, 2009) (emphasis added), <http://seekingalpha.com/article/168288-at-amp-t-q3-2009-earnings-call-transcript>. Thus, the statement in question concerns AT&T’s spectrum holdings, not its LTE deployment plans. Indeed, as noted in the same statement, because LTE technology was still in its development stage, AT&T had not yet even begun testing LTE in its labs. *Id.* Thus, it was hardly in a position to make definitive LTE deployment plans at that time.

considerations. Hogg Reply Decl. ¶ 47. Verizon's plans neither decrease AT&T's costs of such deployment nor increase its expected revenues. *Id.*

Moreover, Verizon is situated differently from AT&T in key respects. It has a nationwide 22 MHz block of 700 MHz spectrum over which it can deploy LTE throughout its footprint. And Verizon's existing 3G EV-DO service is significantly slower than HSPA+ 4G, and thus Verizon has a much stronger imperative to upgrade to LTE to remain competitive. Hogg Reply Decl. ¶ 47. In any case, whatever Verizon's aspirations may be, it has made no enforceable commitment concerning the scope or timing of its LTE deployment.

The Commission cannot, as the opponents would have it, simply assume that AT&T would deploy LTE to 97 percent of the U.S. population in the absence of this transaction when the actual evidence is to the contrary. Instead, just as it has in numerous prior transactions, the Commission should credit that expanded broadband deployment as a significant public interest benefit stemming from the merger.⁹³

2. The Transaction Will Generate Jobs and Economic Growth.

Although some merger opponents claim that the transaction will result in massive layoffs and harm the nation's economy, quite the opposite is true. As a result of the merger, AT&T will

⁹³ Sprint seeks to cast doubt on AT&T's LTE commitment by claiming that AT&T failed to deliver on its promise in connection with its acquisition of Centennial to extend 3G service to Centennial's service areas. Sprint Petition at 123-24. But in the eighteen months between the closing of the Centennial deal on November 6, 2010 and May 5, 2011, AT&T upgraded 331 legacy 2G sites to UMTS in the Centennial area, adding UMTS capabilities at 128 legacy Centennial sites and 203 legacy AT&T GSM cell sites. As a result, AT&T has substantially completed its UMTS deployment stemming from the merger, and any future UMTS expansion in the former Centennial areas will be driven by organic growth requirements to meet market coverage and customer capacity demands. *See* Letter from Celia Nogales, AVP-Regulatory, AT&T to Marlene Dortch, FCC, WT-Docket No. 08-246 (June 8, 2011) (attaching *3G Deployment Progress Report*).

make an additional investment of more than \$8 billion to expand LTE deployment and to integrate the AT&T and T-Mobile USA networks.⁹⁴ That investment will directly produce work within the combined company and externally for engineers, equipment manufacturers, construction firms, and a host of others.

Expanding the advanced LTE platform to 55 million more people will also have job-creating ripple effects throughout the economy, particularly in rural areas. Indeed, governors of states with large rural areas, such as Nevada and South Carolina, recognize that the merger will generate jobs though the “expansion in coverage [that] will enhance connectivity and economic development in areas of Nevada that need it most” and will “put small towns like Bamberg and Chesterfield on an even playing field with population centers like Greenville and Charleston in their efforts to attract new jobs.”⁹⁵ Similar support for the merger has been expressed by the governors of Louisiana, Ohio, Connecticut, Kentucky, Georgia, Maine, North Carolina, Arkansas, Oklahoma, Michigan, Texas, Idaho, Iowa, Tennessee, and Colorado—all of whom recognize that an expanded wireless broadband network will bring economic benefits for small businesses and their employees.⁹⁶

⁹⁴ *Stephenson May 26, 2011 House Testimony.*

⁹⁵ Letter from Governor Brian Sandoval (NV) (May 27, 2011); Letter from Governor Nikki Haley (SC) (May 24, 2011).

⁹⁶ See Letter from Governor Bobby Jindal (LA) (May 19, 2011) (“Job creation has been a major focus of my administration and I support any efforts that aid our state in moving forward. Adding mobile broadband capacity will help create more opportunities for Louisianians—Louisianians who will not have to leave our state to secure a great education or find a rewarding career.”); Letter from Governor Nathan Deal (GA) (May 17, 2011); Letter from Governor Paul LePage (ME) (May 17, 2011) (noting that the merger will result in a stronger company that is better able to keep open the Oakland, ME call center that currently employs 800 people and anchors a 285 acre high-tech business park); Letter from Governor Mike Beebe (AR) (May 23, 2011); Letter from Governor Mary Fallin (OK) (May 24, 2011); Letter from Governor Rick

As Lawrence Summers, then head of the President’s National Economic Council, concluded, “[e]ach dollar invested in wireless deployment is estimated to result in as much as \$7 to \$10 higher GDP,” and, as wireless investment grows, “the benefits for job creation and job improvement are likely to be substantial.”⁹⁷ Chairman Genachowski has likewise recognized that 4G investment can spur hundreds of thousands of new U.S. jobs.⁹⁸ The Economic Policy Institute (“EPI”) recently published an analysis of the job-creating effects of investment, which confirms these statements. Applying its analysis to the proposed merger, EPI estimates that the additional investment of \$8 billion will result in approximately 55,000-96,000 new jobs, which includes direct jobs, supplier jobs and “induced jobs.”⁹⁹ Thus, the transaction will help fulfill the Administration’s “commit[ment] to increasing our investment in innovation—investments that

Snyder (MI) (May 19, 2011); Letter from Governor Rick Perry (TX) to Chairman Genachowski, WT Docket 11-65 (May 25, 2011); Letter from Governor C.L. “Butch” Otter (ID) (May 17, 2011); Letter from Governor Terry E. Branstad (IA) (May 26, 2011); Letter from Governor John W. Hickenlooper (CO) (May 27, 2011); Letter from Governor John R. Kasich (OH) (June 9, 2011); Letter from Governor Daniel P. Malloy (CT) (May 31, 2011).

⁹⁷ Lawrence H. Summers, *Technological Opportunities, Job Creation, and Economic Growth*, Remarks at the New America Foundation on the President’s Spectrum Initiative (June 28, 2010), <http://www.whitehouse.gov/administration/eop/nec/speeches/technological-opportunities-job-creation-economic-growth>.

⁹⁸ Chairman Julius Genachowski, Remarks at CTIA Wireless 2011, at 9 (Mar. 22, 2011), http://transition.fcc.gov/Daily_Releases/Daily_Business/2011/db0322/DOC-305309A1.pdf (“Genachowski CTIA Remarks”) (citing estimate of the High Tech Spectrum Coalition: “[O]ver the next five years, investments in 4G wireless technologies will create 205,000 US jobs, assuming our spectrum infrastructure can handle 4G demand.”).

⁹⁹ Economic Policy Institute, *The Jobs Impact of Telecom Investment*, Policy Memorandum #18 (May 31, 2011), <http://www.epi.org/publications/entry/7127/>.

help create the high-tech, high-wage jobs that we need to remain the world’s most advanced economy.”¹⁰⁰

Indeed, numerous high-tech companies—whose businesses require a robust wireless platform that delivers high quality services at affordable prices—support the merger, not only because they believe it will provide them with that platform, but because “[t]he infrastructure investment required to meet [AT&T’s LTE] commitment will produce and sustain jobs throughout the telecommunications industry and improve America’s overall economic growth.”¹⁰¹ These companies include equipment and handset manufacturers such as ADTRAN, Amdocs, Avaya, Brocade Communications, General Dynamics, JDS Uniphase, Tellabs, Sierra Wireless, RIM, Pantech, and many others.¹⁰² They also include major providers of mobile applications and content, such as Microsoft, Oracle, Yahoo!, and Facebook.¹⁰³ The joint filing by a number of these companies notes “the challenge of keeping pace with consumer demand and continuing to lead globally in wireless broadband service and products” and states that “AT&T’s acquisition of T-Mobile represents a near term means of addressing the rising consumer demand.” They conclude that the “FCC must seriously weigh the benefits of this merger and approve it [to] ensure that we are globally competitive as the world increasingly

¹⁰⁰ U.S. Dep’t of the Treasury, Press Release, *Secretary Geithner Visits with NanoMech and NWA Business Leaders on Efforts to Create Jobs, Spur Economic Growth and Boost US Competitiveness* (Mar. 25, 2011).

¹⁰¹ Letter from Adtran et al. (May 31, 2011) (“*Hi-Tech Companies’ Letter*”).

¹⁰² *Id.* at 2-5 (offering eighty high-tech companies’ support for the merger, based primarily on the merger’s potential to create jobs and economic growth); *id.* at 3 (listing Research In Motion and Pantech Wireless, Inc. as signatories); *see also* Corning Comments at 2-3.

¹⁰³ Michael J. de la Merced, *Big Names in Tech Back AT&T’s Bid for T-Mobile*, NY Times Dealbook (June 6, 2011), <http://dealbook.nytimes.com/2011/06/06/big-names-in-tech-back-atts-bid-for-t-mobile/>; Avaya et al. *Letter*.

embraces wireless broadband connectivity.”¹⁰⁴ Other supporters include the more than 3,000 small- and medium-sized software developers and information-technology providers represented by the Association for Competitive Technology¹⁰⁵; the Silicon Valley Leadership Group, whose 340 member companies are at the forefront of hi-tech innovation and employ more than 250,000 workers in Silicon Valley¹⁰⁶; and dozens of the nation’s largest, most technologically sophisticated businesses represented by TechNet.¹⁰⁷

Venture capital firms, such as Kleiner Perkins Caufield & Byers, Sequoia Capital, and others also recognize the benefits of this transaction for the high-tech industry and for consumers. For example, Kleiner Perkins Caufield & Byers notes that, in addition to “help[ing] millions of Americans throughout the United States gain access to a network that can support innovative technologies, applications and devices,” the “technology start-ups we work with will

¹⁰⁴ *Avaya et al. Letter.*

¹⁰⁵ Association for Competitive Technology Comments at 4-5 (noting that “[m]obile apps are overwhelmingly created by developers in small businesses” and that “the growth of the mobile apps industry has led to job creation all across the United States”); *id.* at 6 (AT&T’s deployment of “4G LTE to 55 million additional Americans will require new jobs and investment” and likely create “a boom of application developers coming out of places other than Silicon Valley or Boston”).

¹⁰⁶ See Silicon Valley Leadership Group Comments at 1-2 (“By expediting the roll-out of 4G-LTE wireless networks to 55 million additional Americans nationwide, the combined company offers tremendous growth potential for the Silicon Valley companies that are producing [] cutting-edge technologies,” enabling those companies to develop programs that “sustain[] jobs and economic growth”).

¹⁰⁷ Press Release, *TechNet Files Supportive Comments with FCC on Proposed Merger of AT&T and T-Mobile* (June 8, 2011), <http://www.technet.org/technet-files-supportive-comments-with-fcc-on-proposed-merger-of-att-and-t-mobile/> (“Expanding the capability and capacity of broadband spectrum is of critical importance to TechNet’s member companies. Such increased broadband spectrum will allow our members to grow their business in the technologies, services, software and equipment that make apps, social networking, mobile banking and payments, long-distance learning, mobile commerce, energy management and countless other activities possible.”).

be a key beneficiary of this more efficient and robust national wireless network.”¹⁰⁸ Similarly, a consortium of venture capital firms state that AT&T’s LTE commitment “will promote innovative technologies, applications and devices [and] will help ensure that venture capitalists and innovators can do what they do best: lead the world in developing new and robust applications, software and technology.”¹⁰⁹ They “urge the Commission to approve this transaction in order to keep the United States at the forefront of innovation and technology.”¹¹⁰

The transaction’s positive effects on jobs and economic growth is further confirmed by the strong support for this transaction by the organizations that represent workers, our nation’s labor unions. Based on its research, AT&T is not aware of any other major FCC transaction in the last 15 years that has received such widespread support from organized labor. As CWA President Cohen explained in testimony before Congress, “the expansion of AT&T’s 4G LTE network that will result from the merger holds the potential to create thousands of new jobs.”¹¹¹ Furthermore, “AT&T, after the merger, will be in a stronger position to create jobs because it will be better able to expand and extend its business than either AT&T or T-Mobile could have

¹⁰⁸ Letter from Mathew J. Murphy, Partner, Kleiner Perkins Caufield & Byers (May 26, 2011); *see also* Letter from Jim Goetz, General Partner, Sequoia Capital (May 24, 2011).

¹⁰⁹ Letter from Jon Auerbach of Charles River Ventures, Tim Barrows of Matrix Partners, Kevin Compton and Stratton Sclavos of Radar Partners, Daniel Deeney of New Venture Partners, Will Griffith of Technology Crossover Ventures, Promod Haque of Norwest Venture Partners, and Jake Seid of Lightspeed Ventures (June 6, 2011).

¹¹⁰ *Id.*

¹¹¹ Prepared remarks of Larry Cohen, President, Communications Workers of America, Hearing of the Senate Judiciary Committee, Antitrust, Competition Policy and Consumer Rights Subcommittee, at 12 (May 11, 2011) (“*Cohen May 11, 2011 Remarks*”); *see also* CWA Comments at 9-10.

done as separate entities.”¹¹² The AFL-CIO, the Teamsters, the Service Employees International Union, the National Education Association, the American Federation of Teachers, the Coalition of Labor Union Women, the United Mine Workers of America, the International Union of Painters and Allied Trade, and the UFCW, among others, have all expressed similar support for the merger and its positive effect on American jobs.¹¹³

Likewise, groups that represent traditionally underserved minority communities recognize the strong potential that the merger has for meaningful job growth. The NAACP, for example, stated “[w]e are hopeful that this acquisition will also further advance increased access to affordable and sustainable wireless broadband services and in turn *stimulate job creation throughout our country*.”¹¹⁴ The Latino Coalition observed that the transaction “should set off a

¹¹² *Cohen May 11, 2011 Remarks* at 12.

¹¹³ See Press Release, AFL-CIO, Statement by AFL-CIO President Richard Trumka on Announced Acquisition of T-Mobile USA by AT&T (Mar. 21, 2011); Press Release, International Brotherhood of Teamsters, Teamsters Support Planned Merger of AT&T and T-Mobile: AT&T Acquisition Positive Step for T-Mobile Workers (Apr. 25, 2011); Press Release, American Federation of Teachers, Statement by Randi Weingarten, President, American Federation of Teachers, On the AT&T Merger with T-Mobile, (undated); Press Release, Coalition of Labor Union Women, Statement of Karen J. See, President, Coalition of Labor Union Women (undated); Press Release, United Mine Workers of America, UMW supports AT&T, T-Mobile merger (May 23, 2011) (“[E]xpanding and upgrading service into rural America will be of great benefit to many of our members and the communities where they live. It will also mean many needed, good-paying jobs for those communities as the network is expanded and upgraded.”) (emphasis added); Press Release, United Food and Commercial Workers International Union, Statement by United Food and Commercial Workers International Union President Joe Hansen on the AT&T Merger (Apr. 28, 2011); Press Release, SEIU’S Henry: Acquisition of T-Mobile USA by AT&T is Good News for Consumers, Workers and U.S. Economy (May 5, 2011); Press Release, Statement from James A. Williams, General President, International Union of Painters and Allied Trades, on the Proposed AT&T and T-Mobile Merger (June 7, 2011); Press Release, National Education Association, AT&T Acquisition of T-Mobile Is a Win for America, Students and Working Families (June 7, 2011).

¹¹⁴ Letter from Hilary O. Shelton, Director Washington Bureau and Senior Vice President for Advocacy and Policy, NAACP, at 1 (Apr. 18, 2011) (emphasis added).

cycle of investment and other business activity that will help support economic growth that helps all Americans,” and will particularly benefit small businesses, who are a driver of job growth.¹¹⁵

The Coalition strongly believes that “the work required to build out an expanded 4G network will create new business opportunity for the Latino [and other] suppliers and vendors who already partner with AT&T and will open the door for new business partners as well.”¹¹⁶ Many other civic organizations throughout the country have likewise decided to support this transaction based in part on its positive effects on jobs.¹¹⁷

¹¹⁵ Press Release (Apr. 8, 2011), attached to Letter from Hector Barreto, Chairman, The Latino Coalition (Apr. 27, 2011).

¹¹⁶ *Id.*

¹¹⁷ See Letter from Ricardo Byrd, Executive Director, National Association of Neighborhoods (Mar. 21, 2011) (“Significant private sector investments in the nation’s wireless digital infrastructure **mean more jobs and economic growth** and innovation opportunities.”) (emphasis added); Statement by Danny J. Bakewell, Sr., Chairman, National Newspaper Publishers Association (Mar. 21, 2011) (the merger “takes us a tangible step closer to our goal of cementing broadband as ‘the great equalizer’ ... and **increasing jobs** and economic opportunities for minority and rural communities”) (emphasis added); Letter from Patrick J. Kiely, President, Indiana Manufacturers Association, Inc. (May 23, 2011), <http://fjallfoss.fcc.gov/ecfs/document/view?id=7021665559> (“This merger has the promise of significantly improving the communications infrastructure of our country” and will thereby “provide the means to encourage manufacturers and other businesses to expand and **create new jobs**”) (emphasis added); Letter from Mike Koller, President, Arkansas Council of CWA Unions (May 23, 2011), <http://fjallfoss.fcc.gov/ecfs/document/view?id=7021651841> (“[T]his merger will be good for the country because it will help usher in a new generation of wireless communications, and will lead to AT&T extending service throughout the country. A better and broader technology infrastructure will encourage entrepreneurs to innovate and businesses to expand, **building our economy and creating jobs**”) (emphasis added); Letter from Lori Church, Western Alliance for Economic Development (May 25, 2011), <http://fjallfoss.fcc.gov/ecfs/document/view?id=7021670397> (“In a world where the majority of jobs are created in the small business sector and broadband technology is the future of employment, it is essential that the FCC approve this merger”); Letter from Keith Scott, Baltimore County Chamber of Commerce (May 26, 2011), <http://fjallfoss.fcc.gov/ecfs/document/view?id=7021675274> (“Access to 4G LTE broadband technology opens up a plethora of opportunities for businesses, promotes competition, **creates jobs**, and contributes to the vitality and strength of our County” and “access to technology promotes innovation which leads to economic growth and **new jobs**”) (emphasis added); Letter

Some opponents nonetheless suggest that mergers inevitably lead to huge job losses, which they speculate will be true here.¹¹⁸ But opponents of the merger who claim that AT&T shed over 100,000 jobs in the past decade conveniently overlook a key point. At the end of 2002, AT&T's wireline predecessors (SBC and BellSouth) had a total of approximately 80 million access lines in service. By the end of the first quarter of 2011, however, AT&T had lost approximately 40 million of those lines—half of its entire access line business—as a result of competition.¹¹⁹ Given the severity of the decline in this part of AT&T's business, it is not surprising that AT&T's overall headcount has also declined.

Indeed, in contrast to the pure speculation of the opponents, CWA President Larry Cohen—who has direct experience with AT&T and is a staunch advocate for job security—observed that “AT&T's management has worked in partnership with CWA to ensure that past mergers worked to the benefit of AT&T's employees, and this transaction will be no different.”¹²⁰ Thus, CWA “believe[s] that the AT&T / T-Mobile merger will be good for U.S. workers.”¹²¹

from Tino J. Mantella, President, Technology Association of Georgia (May 23, 2011) (the transaction “**means more and better paying jobs** for our state. By expanding this faster wireless coverage to virtually the entire country, the merger will enable more rural communities to better support their established businesses while competing to recruit new ones.”) (emphasis added). Other entities that support the merger because it will provide more jobs include the Grand Rapids Area Chamber of Commerce (May 26, 2011), Mayor Shari Buck, City of North Las Vegas (May 25, 2011), the North Dakota Chamber of Commerce (May 26, 2011), the Jobs and Housing Coalition (Oakland, CA) (May 25, 2011), Project Amiga (May 25, 2011), and Jobs for New England NOW (May 24, 2011).

¹¹⁸ See, e.g., Sprint Petition at 76-77; Leap Petition at 32-33.

¹¹⁹ Stephenson May 26, 2011 House Testimony.

¹²⁰ Cohen May 11, 2011 Remarks at 11.

¹²¹ *Id.*

AT&T's prior merger experience is confirmed by a recent study by the Phoenix Center for Advanced Legal and Economic Public Policy Studies. That study concluded that blanket claims of job losses resulting from wireless mergers are "implausible" and that "the evidence actually points in the opposite direction In the recent past, mergers in the wireless industry occur contemporaneously with impressive recoveries in wireless sector and wireless equipment employment."¹²² The Phoenix Center studied the relationship of employment trends in the wireless industry prior to the 2004 merger of AT&T Wireless and Cingular, the largest wireless merger to date. Using Bureau of Labor Statistics data and a standard empirical formula, the Phoenix Center determined that in the months preceding the merger, wireless sector employment was *declining* at an annual rate of approximately 2.4 percent. In the months following the merger, by contrast, sectoral employment *grew* at a rate of 4.6 percent.¹²³ Extrapolating from that data (albeit without claiming a direct causal link), it found that wireless sectoral employment fell 4.7 percent in the two years before the merger, but made a sharp turnaround and grew by 9.4 percent in the two years following the merger.¹²⁴ Thus, the Phoenix Center concludes, wireless sector job-creation did "not appear to be the simple result of general economic trends, as job and income growth in the broader economy [did] not follow the same pattern."¹²⁵ "Given such

¹²² *Wireless Mergers and Employment: A Look at the Evidence*, Phoenix Center Perspectives 11-02, May 10, 2011, at 5 ("*Phoenix Report*"); Press Release, *Phoenix Center Finds Blanket Claims that Wireless Carrier Mergers Reduce Employment to be Implausible* (May 10, 2011), <http://www.phoenix-center.org/perspectives/Perspective11-02PressReleaseFinal.pdf> ("*Phoenix May 10, 2011 Press Release*").

¹²³ *Phoenix Report* at 3.

¹²⁴ *Id.* The Phoenix Center found similar employment trends when it examined the Sprint-Nextel merger, which occurred a year after the merger of AT&T Wireless and Cingular.

¹²⁵ *Id.* at 4-5.

results, the Phoenix Center concludes that the evidence does not support a simplistic argument that wireless sector employment is diminished by wireless carrier mergers.”¹²⁶

Finally, where some jobs serving duplicative functions are eliminated to reduce costs, AT&T will rely mostly on natural attrition. For example, AT&T expects to take advantage of scale economies in financing, marketing, and other redundancies. Consistent with AT&T’s prior experience, as employees retire or take another job, their positions will not be refilled. As the Commission has recognized, these types of headcount reductions and the resulting cost savings are pro-competitive efficiencies; they are certainly not reasons to oppose a merger.¹²⁷

In sum, the record confirms that this transaction will have a positive impact on jobs and the economy. Indeed, at a time when the unemployment rate remains stubbornly high, the significant investments and consequent expansion of employment opportunities that this transaction will produce are vitally important to achieving economic growth and sustained global competitiveness.

II. THE TRANSACTION WILL PRESERVE AND PROMOTE COMPETITION AND INNOVATION.

A. Overview.

Many of the transaction’s opponents assert that this transaction will catapult the market “inexorably toward a 1980s-style duopoly,” which, they say, will raise prices, reduce consumer choice, and suppress innovation.¹²⁸ This “duopoly” rhetoric is as familiar as it is empty. For

¹²⁶ *Phoenix May 10, 2011 Press Release.*

¹²⁷ *AT&T/BellSouth Order*, 15 FCC Rcd at 5769-71 ¶¶ 215, 219; Memorandum Opinion and Order, *SBC Communications, Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, 20 FCC Rcd 18290, 18390-91 ¶ 201 (2005) (“*SBC/AT&T Order*”).

¹²⁸ Sprint Petition at i; *see also* Public Knowledge Petition at 37; Free Press Petition at 6; Media Justice Petition at 9, 17; Rural Telecommunications Petition at 48.

years, the same parties have invoked this same refrain in pushing for a broad range of regulations and merger conditions, all promoted ostensibly to foster “competition” but designed in fact to help insulate industry participants from the very pressures of competition. Each transaction, marketplace development, and Commission inquiry is met with claims that “duopoly” is near or already here. Each time, however, what follows in the real world is further proof that the U.S. wireless marketplace remains intensely competitive: output rises, prices fall, smaller competitors grow, new firms enter, innovation accelerates, and consumers benefit.

The “duopoly” claims are no more credible here. That term means “a [relevant] market in which there are *only two sellers* of a product.”¹²⁹ But that does not describe any market in the wireless ecosystem, nor will it describe any such market post-merger. As an initial matter, the duopoly claim runs headlong into the success of Sprint, the very company that invokes the term most recklessly. With 50 million customers, a billion-dollar advertising budget, and leading 4G device portfolio, Sprint just celebrated “its best total company wireless net subscriber additions in five years.”¹³⁰ And Sprint can continue absorbing millions of new subscribers from its competitors because, in CEO Dan Hesse’s words, “[w]hen you combine Sprint’s spectrum position with Clearwire’s spectrum position it put[s] us in the strongest place for the future.”¹³¹ At bottom, Sprint’s “duopoly” rhetoric argues that, despite these remarkable recent successes and enviable competitive resources, it will collapse as a competitive force if a smaller T-Mobile

¹²⁹ *Woodman v. WWOR-TV, Inc.*, 411 F.3d 69, 71 n.2 (2d Cir. 2005) (quoting *Black’s Law Dictionary*) (emphasis added).

¹³⁰ Press Release, *Sprint Nextel Reports First Quarter 2011 Results* (Apr. 28, 2011), http://newsroom.sprint.com/article_display.cfm?article_id=1879.

¹³¹ *Hesse Mar. 24, 2010 Keynote*; see Section II.E, *infra*.

USA—facing steadily declining share and “struggling for relevance”¹³²—exits the market and merges with AT&T. That is absurd.

More generally, quite apart from Sprint, many other providers will keep this marketplace strongly competitive post-merger. As the Commission determined last year, roughly three-quarters of Americans live in locations where they can choose among five or more facilities-based wireless providers. *See* Section II.C.1, *supra*. This output-increasing transaction will thus—at most—reduce that number to *four* or more facilities-based competitors from which three-quarters of Americans can choose. In most significant population centers throughout America, the wireless service market is fiercely contested not only by Verizon, AT&T, and Sprint, but also by strong no-contract and regional providers of *nationwide* voice and data services such as MetroPCS, Leap/Cricket, U.S. Cellular, and Cellular South.

Merger opponents try to write these providers out of the competitive analysis by urging the Commission to abandon its longstanding definitions of the relevant markets. In the process, however, they persistently conflate two distinct antitrust concepts: geographic markets and product markets. For example, in advocating a national geographic market definition, Sprint argues that “[t]he ability to offer nationwide service is now a critical dimension of competition. . . . [T]here is no market for regional or local calling plans.” Sprint Petition at 20 (internal quotation marks omitted). That may be true as matter of *product* market definition, but it has nothing to do with *geographic* market definition. As discussed in Section II.B.1 below, these no-contract and regional providers offer *smartphone* plans with nationwide *coverage*, which they obtain through a combination of facilities ownership and roaming arrangements

¹³² *J.P. Morgan January 2011 Analysis* at 18.

(typically with CDMA-based providers rather than the GSM-based AT&T and T-Mobile USA).

Those nationwide plans enable the regional and no-contract providers' customers to use their handsets when they travel, generally without incurring retail roaming fees throughout areas covering the great majority of the U.S. population. *See* Section II.B.2, *infra* (refuting opponents' roaming-fee arguments); Carlton Decl. ¶¶ 104, 112, 115; Pub. Int. St. at 82-92 (coverage maps).

The opponents nonetheless suggest that this transaction will harm regional and no-contract providers simply because, although their own subscribership counts will remain unaffected, they will fall farther “behind” the combined total subscribership figures of Verizon and AT&T. *See, e.g.,* Sprint Petition at iii, 8. That theory contradicts basic market realities. For many years, AT&T and Verizon have had much larger *total* subscriber bases than their many competitors, and yet the marketplace has witnessed falling prices, increasing output, rapid innovation, small carrier growth, and major new entry. For example, as the Commission has noted, MetroPCS and Leap are two of the fastest-growing wireless providers in the industry even though they retail service to customers living only in a subset of the nation's geographic markets.¹³³ Indeed, MetroPCS boasts that it has one of the lowest cost structures in the industry—lower than AT&T's and Verizon's—despite its smaller scale.¹³⁴ And U.S. Cellular and Cincinnati Bell are estimated to have captured **[Begin Confidential Information]**

¹³³ *See, e.g., Fourteenth Report*, 25 FCC Rcd at 11520 ¶ 175 (“MetroPCS and Leap, while smaller than the top four providers, increased their subscriber bases by about 24 and 29 percent, respectively in 2009,” each of which is a substantially greater increase than any other provider); *see* Section II.C.1, *infra*.

¹³⁴ *See, e.g.,* Scott Woolley, *The upstart company that made the AT&T-mobile merger possible*, Fortune Tech (Mar. 22, 2011), <http://tech.fortune.cnn.com/2011/03/22/the-upstart-company-that-made-the-att-mobile-merger-possible>; *see also MetroPCS May 3, 2011 Earnings Call Tr.* at 4 (“We have the best in class cost structure”).

[End Confidential Information],

even though their *nationwide* subscribership figures are much smaller than AT&T's or Verizon's today. Christopher Reply Decl. ¶ 4.

Nothing about this transaction will affect these market realities. It is particularly untenable to suggest that T-Mobile USA, with its declining 11 percent share of subscribers and lack of any clear path to LTE, plays a dispositive role in keeping this marketplace competitive, or that its merger with AT&T will somehow dispatch the industry back to the brick-phone era of the early 1980s. The opponents nonetheless claim that AT&T's incremental size increase will somehow enable it to raise rivals' costs by restricting access to various *inputs*, such as those for handsets, roaming, and backhaul. These input-related concerns are baseless for the reasons discussed in Section II.C below, but several points warrant emphasis up front.

First, many of the opponents' input arguments are not even merger-specific. To take one example, Sprint and Leap claim that the combined company will somehow tip the market to duopoly by withholding (or raising rates for) roaming services. But like most other major providers, Sprint and Leap are CDMA-based carriers and thus purchase little or no roaming on AT&T or T-Mobile USA's GSM-based networks today because of network incompatibility issues. This merger could have no effect on those providers' roaming rights, let alone "tip" this CDMA-dominated market to "duopoly." The same will be true once LTE takes hold, given that T-Mobile USA has no clear path to LTE—and thus no clear path to the provision of LTE-based roaming services. Other non-merger-specific arguments abound throughout the petitions to deny. To take another example, T-Mobile USA (with the exception of a single local license) does not have low-band spectrum, but that does not stop the opponents from citing AT&T's

supposed excess of such spectrum as a reason to oppose the merger. T-Mobile USA also is not a provider of backhaul services in its own right nor a significant enough purchaser that this transaction could harm today's strongly competitive marketplace for Ethernet services. But neither those facts nor the pendency of the special access rulemaking proceeding can stop the opponents from misusing this merger proceeding to recycle their increasingly stale special access advocacy.

Second, insofar as the merger allows AT&T to decrease its costs and compete more effectively, that is a public interest *benefit*, not a harm, as some merger opponents seem to assume.¹³⁵ Of course, Sprint and other rivals can be expected to resist any transaction that enhances AT&T's efficiency and makes it a more effective competitor. But the "Commission's

¹³⁵ Carlton Reply Decl. ¶ 52; *see, e.g.*, U.S. Department of Justice and the Federal Trade Commission, *2010 Horizontal Merger Guidelines*, § 10 ("a primary benefit of mergers to the economy is their potential to generate significant efficiencies and thus enhance the merged firm's ability and incentive to compete, which may result in lower prices, improved quality, enhanced service, or new products"), <http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf> ("*2010 Horizontal Merger Guidelines*"); Memorandum Opinion and Order, *SBC/AT&T Order*, 20 FCC Rcd at 18282 ("After analyzing the record, we conclude that significant public interest benefits are likely to result from this transaction. These benefits, which are likely to flow to consumers, relate to . . . economies of scope and scale, and cost savings."); Memorandum Opinion and Order, *General Motors Corporation and Hughes Electronics Corp., Transferors and the News Corp. Ltd., Transferee, for Authority to Transfer Control*, 19 FCC Rcd 473, 610 ¶ 316 (2004) ("*GM/Hughes Order*") ("we find that the proposed transaction is likely to yield some benefits in the form of increased economies of scale and scope"); *see also, e.g.*, Memorandum Opinion and Order, *Applications of AT&T Inc. and Centennial Commc'ns Corp. for Consent to Transfer Control of Licenses, Authorizations, and Spectrum Leasing Arrangements*, 24 FCC Rcd 13915, 13959-60 ¶¶ 106 (recognizing economies of scale as a merger benefit), 108 (2009) ("*AT&T/Centennial Order*"); Memorandum Opinion and Order, *Applications of AT&T Inc. and Dobson Commc'ns Corp. for Consent to Transfer Control of Licenses and Authorizations*, 22 FCC Rcd 20295, 20334-36 ¶ 83-84 (2007) ("*AT&T/Dobson Order*") (same); Memorandum Opinion and Order, *Applications of AT&T Wireless Servs., Inc. and Cingular Wireless Corp. for Consent to Transfer Control of Licenses and Authorizations*, 19 FCC Rcd 21522, 21610 ¶ 232 (2004) (same) ("*Cingular/AT&T Order*"); *United States v. Western Elec. Co.*, 900 F.2d 283, 296 (D.C. Cir. 1990) ("no damage to competition . . . can occur" unless the firm can exercise market power, which is "the ability to restrict output and/or raise prices").

statutory responsibility is to protect competition, not competitors,”¹³⁶ and such efficiency gains are an important public interest *benefit* that supports any transaction that produces them.

As the Commission has explained, a large firm “in virtually any market will have certain advantages—including, perhaps, resource advantages, scale economies, established relationships with suppliers, ready access to capital, etc. Such advantages do not, however, mean that these markets are not competitive, *nor do they mean that it is appropriate for government regulators to deny the [firm] the efficiencies its size confers in order to make it easier for others to compete.* Indeed, the competitive process itself is largely about trying to develop one’s own advantages, and all firms need not be equal in all respects for this process to work.”¹³⁷ In any event, scale is only one factor that determines a carrier’s costs; and in this industry like any other, scale can sometimes increase costs. Indeed, as noted, MetroPCS claims to have one of the lowest cost structures in the industry.

Third, although the opponents’ submissions abound with HHI and other market-concentration statistics, those figures prove nothing by themselves.¹³⁸ As courts and antitrust scholars have agreed, “often highly concentrated markets . . . may actually yield competitive

¹³⁶ Order and Authorization, *Application of Alascom, Inc. AT&T Corp. and Pacific Telecom, Inc. For Transfer of Control of Alascom, Inc. from Pacific Telecom, Inc. to AT&T Corp.*, 11 FCC Rcd 732, 758 ¶ 56 (1995); accord *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (antitrust rules are designed for “the protection of competition not competitors”) (internal quotation marks omitted).

¹³⁷ Report and Order, *Competition in the Interstate Interexchange Marketplace*, 6 FCC Rcd 5880, 5892 ¶ 60 (1991) (emphasis added).

¹³⁸ See, e.g., *Capital Cities/ABC, Inc. v. FCC*, 29 F.3d 309, 315 (7th Cir. 1994) (observing that it has been “many years since anyone knowledgeable about” competitive analysis “thought that concentration by itself imported a diminution in competition”).

pricing,”¹³⁹ a point reaffirmed in the Commission’s *National Broadband Plan*: “modern analyses find that markets with a small number of participants can perform competitively.”¹⁴⁰ The wireless marketplace is a textbook illustration of that point. As Sprint notes (Petition at 35), “[t]he wireless industry is characterized by high fixed costs and comparatively low marginal costs,” at least for providers with sufficient capacity. Such cost structures give non-capacity-constrained firms unusually strong incentives, even in highly consolidated markets, to keep prices low to win and retain incremental customers, because such firms save few costs when they lose customers but forgo all associated revenues.¹⁴¹

Thus, although the HHI for the wireless industry has been high for years by comparison to HHIs of other industries with different cost structures, *see* Free Press Petition at 6, it remains highly competitive, innovation has flourished, and prices have plummeted. *See* Pub. Int. St. at 65-69. Indeed, from 1999 to 2009, the average price of wireless voice services dropped 50 percent amid substantial industry consolidation—and prices for text messages and data per

¹³⁹ Herbert Hovenkamp, *Federal Antitrust Policy, The Law of Competition And Its Practice*, Third Edition, at 168 (2005 Thompson/West Publishing); Joseph Farrell & Carl Shapiro, *Antitrust Evaluation of Horizontal Mergers: An Economic Alternative to Market Definition*, at 4 (Nov. 25, 2008) (“[i]n recent decades . . . industrial organization scholars and the courts have been more apt to stress that high concentration can be compatible with vigorous competition and efficient market performance”).

¹⁴⁰ *National Broadband Plan* at 37.

¹⁴¹ *See, e.g.,* Timothy J. Tardiff, *Changes in Industry Structure and Technological Convergence: Implications for Competition Policy and Regulation in Telecommunications*, 4 Int’l Econ. & Econ. Pol. 109 (2006); Dennis L. Weisman, *When Can Regulation Defer to Competition for Constraining Market Power?: Complements and Critical Elasticities*, 2 J. Comp. L. & Econ. 101, 102 (2006) (“[P]rice increases that produce even small reductions in demand can generate large losses in contribution to joint and common costs because the firm’s revenues decline much more than the costs it can avoid. It is in this manner that high margins can serve to discipline the (de)regulated firm’s pricing behavior.”); *see also* Willig Decl. ¶¶ 21, 102.

megabyte have fallen even faster (*see* Pub. Int. St. at 65-67)—in the teeth of widespread predictions that such consolidation would lead to higher prices.¹⁴² That has prompted one industry analyst to observe that “trend lines for wireless pricing before and after wireless mergers do not support the theory that the merger will lead to price increases. As the late Senator Moynihan famously said: ‘We are all entitled to our opinions, but not our own facts.’”¹⁴³

For these reasons, the Commission has made clear that triggering the “HHI screen” (*see* Pub. Int. St. 75-76) does not itself signify anything about the likely competitive effects of a merger—a point the merger opponents overlook in their singular emphasis on HHI figures. In the *Cingular/AT&T Wireless Order*, the Commission found that “there is generally effective competition in mobile telephony markets today” even though “the current average HHI in markets across the country is slightly over 2900.”¹⁴⁴ The Commission nonetheless “chose initial thresholds of 2800 for the HHI and 100 for the change in HHI” as conservative measures designed simply to “eliminate from further review those markets in which there is clearly no competitive harm relative to today’s generally competitive marketplace.”¹⁴⁵ Like the spectrum screen (*see* Section II.E, *infra*), the HHI screen is a processing tool designed only to identify markets that fall outside this safe harbor and should therefore be subject to further review.

¹⁴² See GAO, *Telecommunications: Enhanced Data Collection Could Help FCC Better Monitor Competition in the Wireless Industry*, at 24 (July 2010), <http://www.gao.gov/new.items/d10779.pdf> (“GAO 2010 Report”).

¹⁴³ Roger Entner, *Sprint the winner if AT&T absorbs T-Mobile?*, CNET News (June 6, 2011), http://news.cnet.com/8301-1035_3-20068758-94/sprint-the-winner-if-at-t-absorbs-t-mobile/.

¹⁴⁴ *Cingular/AT&T Wireless Order*, 19 FCC Rcd at 21568 ¶ 107.

¹⁴⁵ *Id.* at 21568 ¶¶ 107-08.

Fourth, the various horizontal and vertical theories of competitive harm spun out by Sprint's economic team are as implausible and self-contradictory as they are convoluted. Sprint claims simplistically that, by increasing market concentration, this merger will enable AT&T to raise prices unilaterally—which, as Professor Carlton demonstrates, is exceedingly unlikely. But in the next breath, Sprint undercuts its own unilateral effects theory by positing that, if AT&T raised its retail prices, it would *also* have to raise its rivals' input costs to make them raise their own prices and thereby keep them from underselling AT&T. But not even Sprint suggests that AT&T could pursue such a strategy against Verizon. Sprint must therefore figure out a way to envelop Verizon in this anticompetitive play, so it speculates that Verizon will suddenly cooperate in a price increase rather than exploiting it to win more customers from AT&T.

Each of the three legs on which this stool rests is broken. First, as Professor Carlton explains, it is highly unlikely that this transaction could produce any anticompetitive unilateral effects because the combined company will continue to face strong competition post-merger. Indeed, according to the Commission's data, AT&T will be only one of at least four facilities-based providers in markets serving three-quarters of all Americans. *See* Section II.C.1, *infra*. Second, upstream competition, regulation, and simple network realities will keep the combined company from raising its rivals' input costs, and even if it could raise those costs, it still could not materially affect Sprint's margins or retail pricing—according to Sprint's own data. Third, it is implausible to assert that AT&T and Verizon would suddenly stop competing after this merger because—as Professors Carlton and Willig observe, and as Sprint's own economists explained in a prior merger proceeding—this industry is particularly resistant to anticompetitive coordination. And in a final irony, Sprint's bizarre theory of harm is *not even a theory of duopoly* because it

posits an industry-wide price increase that enables Sprint and other competitors to retain their margins and continue competing. In short, on almost every level, Sprint’s “duopoly” claim is incoherent and unsupportable. It makes for strong rhetoric in a public relations campaign, but it wilts under even the slightest scrutiny.

Finally, there is no plausible basis for the opponents’ frequent refrain that this transaction will “stifle innovation” in the wireless broadband marketplace. As Chairman Genachowski has explained, “[r]obust networks and powerful devices are allowing us to do all kinds of things we could barely have imagined a few years ago,” and “[i]t’s hard to imagine an industry that’s produced more game-changers than the wireless industry.”¹⁴⁶ This transaction can only accelerate such innovation by alleviating the applicants’ capacity constraints, spurring the deployment of LTE to millions of Americans who would otherwise not receive it, and supporting the next generation of bandwidth-intensive applications.¹⁴⁷

A broad cross-section of the high-tech community has driven that point home by urging the Commission to approve this transaction. In a recent joint letter, Avaya, Brocade, Facebook, Microsoft, Oracle, Qualcomm, RIM, and Yahoo! exhort the Commission to “seriously weigh the benefits of this merger and approve it” because “[a]n increasingly robust and efficient wireless network is part of a virtuous innovation cycle and a healthy wireless ecosystem is an important

¹⁴⁶ *Genachowski CTIA Remarks* at 2, 4.

¹⁴⁷ Some merger opponents point to recent service difficulties and related customer dissatisfaction to argue that AT&T has not been a leading innovator. In fact these issues confirm the opposite conclusion: AT&T’s difficulties related to spectrum exhaustion arise because it has *led* the introduction and adoption of advanced mobile broadband devices and more bandwidth-intensive services, and it therefore has a customer base weighted toward users of such advanced services.

part of our global competitiveness.”¹⁴⁸ TechNet likewise filed supportive comments because, as it explained, “[e]xpanding the capability and capacity of broadband spectrum is of critical importance to TechNet’s member companies. Such increased broadband spectrum will allow our members to grow their business in the technologies, services, software and equipment that make apps, social networking, mobile banking and payments, long-distance learning, mobile commerce, energy management and countless other activities possible.”¹⁴⁹

The high tech community is uniquely positioned to address the merits of this transaction because it spends every day investing, innovating, and creating new products and services for the broadband ecosystem. That community’s support is a complete response to the claims by merger opponents that this transaction could harm innovation. In any event, that claim proceeds from the same faulty premise that pervades the opponents’ advocacy generally: that the transaction will harm competition and tip the industry to a “duopoly.” Because that premise is false, there is no basis for the opponents’ innovation concerns either. Indeed, the very centrality of innovation in wireless competition undermines the opponents’ contention that this merger could harm either competition or innovation. As Professor Willig explains, the imperative to innovate in the wireless marketplace prevents providers from coordinating their conduct to harm consumers and gives each provider enormous incentives to avoid competitive irrelevance by continuing to improve its products. Willig Decl. ¶ 4. In short, innovation is multifaceted and global in scope; it arises unpredictably throughout the entire global ecosystem for advanced mobile technologies;

¹⁴⁸ *Avaya et al. Letter.*

¹⁴⁹ Press Release, *TechNet Files Supportive Comments with FCC on Proposed Merger of AT&T and T-Mobile* (June 8, 2011), <http://www.technet.org/technet-files-supportive-comments-with-fcc-on-proposed-merger-of-att-and-t-mobile/>.

and there is “no plausible claim that a combined AT&T/T-Mobile could harm innovation[.]” *Id.*

¶ 12.

B. The Commission Should Follow Its Established Precedent on Geographic and Product-Market Definition.

1. The Opponents’ Focus on a National Market Is Misplaced.

As discussed in the Public Interest Statement (at 72-75), the Commission has concluded in a long and unbroken line of precedent that the geographic market for wireless services is “a local area, as opposed to a larger regional area or a nationwide area.”¹⁵⁰ The Department of Justice has likewise concluded that mobile services are offered in “numerous local geographic markets,” given that, among other considerations, customers generally choose among providers that market services “where they live, work, and travel on a regular basis” and “[t]he number and identity of . . . providers varies among geographic areas[.]”¹⁵¹ Indeed, local sales (at a store or

¹⁵⁰ *Cingular/AT&T Wireless Order*, 19 FCC Rcd at 21563 ¶ 89; *see, e.g., Verizon-Alltel Order*, 23 FCC Rcd at 17472 ¶ 52 (“[T]he geographic market is the area within which a consumer is most likely to shop for mobile telephony/broadband services. For most individuals, this market will be a local area, as opposed to larger regional or national area.”); *see also* Memorandum Opinion and Order and Declaratory Ruling, *Applications of Celco Partnership D/B/A Verizon Wireless and Rural Cellular Corporation for Consent to Transfer Control of Licenses, Authorizations, and Spectrum Manager Leases and Petitions for Declaratory Ruling*, 23 FCC Rcd 12463, 12485 ¶ 41 (2008) (“*Verizon/RCC Order*”); *AT&T/Dobson Order*, 22 FCC Rcd at 20310 ¶ 25 (2007); Memorandum Opinion and Order, *Application of Great Western Cellular Partners, LLC and Alltel Commc’ns, Inc. for Consent to Transfer Control of License*, 21 FCC Rcd 11526, 11545-49 ¶¶ 35-43 (2006) (“*Midwest Wireless Order*”); Memorandum Opinion and Order, *Applications of Western Wireless Corporation and Alltel Corporation for Consent to Transfer Control of Licenses and Authorizations*, 20 FCC Rcd 13053, 13072-75 ¶¶ 44-51 (“*Western Wireless Order*”); Memorandum Opinion and Order, *Applications of Nextel Commc’ns, Inc. and Sprint Corporation for Consent to Transfer Control of Licenses and Authorizations*, 20 FCC Rcd 13967, 13991, 13993-95 ¶¶ 57, 63-67 (2005) (“*Sprint/Nextel Order*”); *Cingular/AT&T Wireless Order*, 19 FCC Rcd at 21562-63 ¶¶ 87-90.

¹⁵¹ Complaint, *United States v. AT&T Inc.*, 1:09-cv-01932-JDB, ¶ 15 (D.D.C. filed Oct. 13, 2009).

kiosk) account for approximately [Begin Confidential Information] [End Confidential Information] percent of industry-wide total sales and approximately [Begin Confidential Information] [End Confidential Information] of the sales for T-Mobile USA and [Begin Confidential Information] [End Confidential Information] of the sales for MetroPCS. *See* Pub. Int. St. at 73-74; Alling Decl. ¶ 5.

Many merger opponents wish to overturn that longstanding analytical framework,¹⁵² presumably because that is the *only* way they can hope to distract the Commission from the strong and growing competition that comes from regional providers and no-contract mavericks, which offer nationwide voice-and-data services in competition with Verizon, AT&T, Sprint, and T-Mobile USA but do not retail those services to customers living in all markets nationwide.¹⁵³

¹⁵² One notable exception is COMPTTEL, which acknowledges that the relevant geographic market is local, not national. COMPTTEL Petition at 10.

¹⁵³ As various opponents point out, AT&T argued in previous transactions for a national retail market definition, although it did *not* suggest—as the opponents effectively do here—that such a definition would permit the Commission to ignore the competitive discipline imposed by non-“national” providers. The Commission and the Department of Justice both rejected that national market definition on the ground that a local market definition would better capture competitive dynamics. AT&T has hardly flip-flopped by accepting those repeated determinations as settled. Instead, certain merger opponents themselves—such as the Rural Cellular Association, the Rural Telecommunications Group, and Consumers Union—are more reasonably accused of expediency in urging the Commission to abandon the local market definition they previously encouraged the Commission to maintain when it suited their interest. *See, e.g.,* Reply of Rural Cellular Association to Joint Opposition to Petitions to Deny and Comments, *Applications of Atlantis Holdings LLC, And Cellco Partnership D/B/A Verizon Wireless, for Consent to Transfer Control of Licensees, Authorizations, and Spectrum Manager and De Facto Transfer Leasing Arrangements*, WT Docket No. 08-95, at 13 (Aug. 26, 2008) (“the Commission should conclude as it has in other merger reviews that the relevant geographic market is local and that CMAs define the relevant local market”); Comments of the Rural Telecommunications Group, *Applications of Western Wireless Corporation, and ALLTEL Corporation, Applications for Transfer of Control of Licenses and Authorizations*, WT Docket No. 05-50, at 6 (Mar. 9, 2005) (“the relevant market that the Commission must consider in the proposed transaction is not the nationwide market, but rather the local market”); Petition to Deny of Consumer Federation of America and Consumers Union, *Application for the Transfer of*

In the process, however, they routinely conflate questions of geographic market (*i.e.*, the places where consumers look for competitive alternatives) with questions of product market (*i.e.*, the nature of the services offered, including whether those services include nationwide coverage). *See, e.g.*, Sprint Petition at 20. Only through that illogical conflation can the opponents exclude regional and no-contract providers from the competitive picture, assert that “there are only four participants in the market—AT&T, Verizon, Sprint, and T-Mobile,” and conclude that “the merger reduces the number of significant competitors from 4 to 3[.]” AAI Comments at 5. But competition from no-contract and regional providers cannot sensibly be ignored.

First, consumers in a given geographic area choose among the wireless providers that offer service in that area, and each of the wireless providers serving that area faces competition from every other. In making purchase decisions, consumers consider the *service features* offered by each provider, including whether given providers offer nationwide coverage, either over their own networks or through roaming arrangements or—as is the case with nearly all providers, including AT&T and T-Mobile USA—some combination of the two. But consumers in one locality do not generally care whether a given provider *also* markets the same service to consumers living in other localities. Moreover, despite suggestions to the contrary (*e.g.*, Sprint Petition at 13-14), there is no strong correlation between a provider’s decision to enter all or only some of the nation’s geographic markets and the nature of the services it offers within each of those markets. In particular, many providers that *market* services only in some geographic regions—such as U.S. Cellular, MetroPCS, Leap, Cincinnati Bell, and Cellular South—

Control of Licenses and Authorizations from AT&T Wireless Services, Inc., and Its Subsidiaries to Cingular Wireless Corp., WT Docket No. 04-70, at 4-6 (May 3, 2004) (“Wireless is sold as a local product.”).

nonetheless offer *nationwide coverage*, generally without retail roaming fees in areas covering most of the U.S. population. *See* Pub. Int. St. at 82-91; Section II.B.2, *infra* (rebutting claims that retail roaming fees charged by no-contract providers in less-traveled areas are market-defining).

The fact that consumer choices vary widely from locality to locality further confirms the appropriateness of a local geographic market definition. Any wireless provider, including AT&T, may have a stronger network, distribution and brand in some areas, and a weaker one in other areas. *See, e.g.*, Christopher Reply Decl. ¶¶ 3-5; *see also* Alling Decl. ¶¶ 4, 7. And the lineup of wireless providers from which consumers can choose will also vary. In addition to Verizon, Sprint, and AT&T, consumers in Miami can choose MetroPCS, consumers in Milwaukee can choose U.S. Cellular, consumers in Houston can choose Leap, consumers in Philadelphia can choose either MetroPCS or Leap, consumers in Jackson, Mississippi can choose Cellular South, and so on. In each case, the competitive outcomes depend on the offerings made to each consumer in his or her area.

Many merger opponents appear to have missed these points, but they are dispositive of geographic market definition. If wireless providers had to market service to all customers throughout the United States in order to succeed, there could be no accounting for the success of MetroPCS, Leap, U.S. Cellular, Cincinnati Bell, and Cellular South, which all offer nationwide voice and data services but retail them only in a subset of local markets. Such providers are formidable rivals in the markets where they do compete. For example, facilities-based no-contract providers like MetroPCS or Leap have **[Begin Confidential Information]**

[End Confidential Information.] See Christopher Reply Decl. ¶ 4 n.3.

This means that, in Miami, AT&T must compete not only against Verizon, Sprint, and T-Mobile USA, but also against MetroPCS, which is estimated to have won **[Begin Confidential Information]** **[End**

Confidential Information] Christopher Decl. ¶ 61. AT&T must compete against U.S. Cellular in Madison, Wisconsin, where U.S. Cellular is estimated to have **[Begin Confidential Information]**

[End Confidential Information] Christopher Reply Decl. ¶ 4 n.2. And it must compete against Cellular South in local markets in several southern states, including Mississippi markets where **[Begin Confidential Information]**

[End Confidential Information] *Id.* ¶ 4.

Some opponents nonetheless argue that the relevant geographic market must be “national” because, to ensure consistency in its marketing message and efficiency in its training and customer care, AT&T (like other providers) engages in national advertising and adopts basic pricing plans that are uniform across the country. Christopher Reply Decl. ¶ 8. But the Commission has recently considered and rejected that argument. It has found that the relevant geographic market is local even when “prices are set on a national level” and “consumers shop for national plans and national rates.”¹⁵⁴

¹⁵⁴ *AT&T/Centennial Order*, 24 FCC Rcd at 13934 ¶ 41. Although Sprint argues (Petition at 19-20) that the Commission’s local market definition rests on outdated facts, the Commission reaffirmed its ample basis for that definition as recently as 2009. *See id.*; *see also Verizon/Alltel Order*, 23 FCC Rcd at 17472-43 ¶ 52. In any event, the trend towards greater regional autonomy

That conclusion is even more compelling today. To begin with, the opponents are wrong when they suggest that AT&T today makes all important retail decisions, including pricing decisions, solely at the national level. AT&T is organized to provide and market its services locally. Christopher Reply Decl. ¶¶ 6-32. For example, in addition to its headquarters operations, AT&T has divided its operations into 27 territories, each headed by a vice-president-general manager (“VP-GM”) with profit-and-loss responsibility for his or her territory and responsibility for setting local competitive strategy. These include developing local marketing, advertising, and direct mail campaigns; offering local promotions such as switcher credits, handset discounts, accessory promotions, and waived activation fees; implementing local retail distribution strategy; and directing network improvements in local areas. *See id.*; Christopher Decl. ¶¶ 12-14; *see also* Pub. Int. St. at 74.

T-Mobile USA has implemented a similarly decentralized marketing approach based on 23 regional offices. As Chief Operations Officer James Alling explains in his attached declaration, “[t]he critical need to restructure was highlighted when [CEO Philipp] Humm and I traveled to Miami in August of 2010. There we saw firsthand while visiting numerous competitive stores (with a special focus on Metro PCS) how T-Mobile USA’s national distribution and marketing strategy was failing. . . . The trip illustrated that we in Bellevue, Washington were not in touch with the needs of the Miami market and that our national messaging was not as effective as the local messaging opportunities we had discussed.” Alling Decl. ¶ 12.

in competitive decisionmaking, exemplified by T-Mobile USA’s own experience (see below), confirms that a local market definition is more appropriate today than ever.

This decentralized approach affects the marketing and pricing of wireless services in important ways. AT&T supplements its national advertising with local advertising tailored to market conditions, and it offers local promotions limited to customers in particular areas. For example, various local AT&T offices have— **[Begin Confidential Information]**

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[End Confidential Information] Christopher Reply Decl. ¶¶ 8-32. These examples typify a general practice of customized local responses to competition at the local level. These responses can take the form of reduced prices on service or associated charges; reduced prices on handsets, accessories or add-on services; investments in the local network to induce existing customers to stay and win new customers; and other efforts to attract customers through expanded advertising, distribution and marketing. *See id.*

Similarly, under T-Mobile USA’s “Local Go To Market” strategy, each of the company’s 23 regional teams must **[Begin Confidential Information]**

[End Confidential Information]. Alling Decl. ¶ 15.

In particular, those regional T-Mobile USA teams [Begin Confidential Information]

[End Confidential Information]

Alling Decl. ¶ 14.¹⁵⁵

In any event, no matter how the geographic market is defined, it would be nonsensical to ignore the competitive pressures exerted by no-contract and regional providers. Even AT&T's national "default" prices are products of the competition provided by all the many participants in every local market, and they are therefore constrained not only by the "national" prices of

¹⁵⁵ Sprint claims that the four largest carriers do not vary their handset or rate plan pricing at the local level, yet purports to substantiate that conclusion only by citing a crude "preliminary survey" of those carriers' offerings on their Internet websites in a sample of 150 zip codes around the country. Sprint Petition, CRA Decl. ¶ 56 n.46. Any such survey, however, would naturally miss local offers that are often unavailable through nationally-administered websites but are publicized through local print, direct mail, point-of-sale, and other media advertising. Christopher Reply Decl. ¶ 16. [Begin Confidential Information]

[End Confidential Information] Alling Decl. ¶ 16.

Indeed, *Sprint itself* appears to market its services locally and offer local discounts. For example, during a single weekend in 2010, "Sprint ran a one-day '\$50 off all phones' advertisement in Los Angeles, while on the same weekend it ran an advertisement promoting '\$30 off any phone of your choice' in Detroit, a 'Free Android phone' advertisement in Miami, an 'All BlackBerries are Free' advertisement in Harrisburg, Pennsylvania, and a Spanish language Quick Messaging Device promotional advertisement in San Jose." Christopher Reply Decl. ¶ 15.

Verizon, Sprint, and T-Mobile USA, but also by the regional and local pricing of all providers.¹⁵⁶

Sprint's own experts have acknowledged the same phenomenon.¹⁵⁷

The upshot is that if the post-merger AT&T tried to increase national prices after this transaction is completed, then, according to the Commission's own data, three-quarters of the U.S. population could choose any one of three or more competitive alternatives to AT&T.¹⁵⁸ It is inconsequential that the identity of those alternative providers would vary from one local market to the next. Both individually and collectively, these providers constrain the pricing decisions of Verizon, AT&T, Sprint, and T-Mobile USA. The same is true not only of price levels, but also the other terms and conditions of service. For example, MetroPCS and Leap

¹⁵⁶ As the Commission has explained, such default prices are inversely related to the weighted average of the price elasticities in all the local markets, where the weights are the market shares in the various local markets. *See* Hearing Designation Order, *Application of Echostar Commc'ns Corp., Transferors, General Motors Corp., and Hughes Electronics Corp., and Echostar Commc'ns Corp., Transferee*, 17 FCC Rcd 20559, 20611 ¶ 121 (2002) ("Moreover, if the merged entity sets a single nationwide price, the price level it sets will depend not only on the elasticities of demand in the three types of markets, but also on the relative proportion of total households that each category represents.").

¹⁵⁷ "In setting its uniform national price, each carrier may as an economic matter take into account local conditions and aggregate them up into an overall effect on the total national demand for its own product and the type of competitive interaction that it would expect." Sprint Petition, CRA Decl. ¶ 63 n.55.

¹⁵⁸ The Commission found in 2010, on the basis of information collected in 2009, that approximately three-quarters of Americans lived in localities contested by at least *five* facilities-based wireless providers. *See Fourteenth Report*, 25 FCC Rcd at 11448-49 ¶¶ 42-45. This merger could at most reduce that figure to *four* or more providers in the subset of those localities where both AT&T and T-Mobile USA compete. Although the cited figure in the *Fourteenth Wireless Report* included some providers that offered telephony services but not mobile broadband, a wide variety of no-contract and regional providers—from MetroPCS and Leap to U.S. Cellular and Cellular South—have aggressively deployed 3G and now 4G smartphone services during the intervening two years since those data were collected, and Clearwire and LightSquared are building out new 4G networks of their own. *See* Section II.B.2, *infra*. If anything, therefore, Americans in many localities have *more* competitive choices than reflected in the *Fourteenth Report*.

pioneered the no-contract “all you can eat” (“AYCE”) model that changed wireless pricing on an industry-wide basis. At the end of 2007, only two carriers offered unlimited voice plans: MetroPCS and Leap. Christopher Decl. ¶ 50. A few months later, in early 2008, Sprint, Verizon, AT&T and T-Mobile USA all responded with their own unlimited plans. *Id.* And AT&T, Verizon and T-Mobile USA have since lowered the price of their “unlimited” contract offerings in reaction to the success of plans offered by MetroPCS, Leap, and other “all you can eat” carriers. *Id.*¹⁵⁹

Finally, the proponents of a “national” market definition fall back on the distinct argument that, even if the *retail* wireless service market is local, the markets for certain *inputs* (such as handsets) are not. And they argue that this transaction will somehow increase the combined company’s incentive and ability to manipulate those input markets to the detriment of retail competition everywhere. Those arguments lack merit for the reasons discussed in Section II.D below. But even if those arguments had merit, they would not be reasons to adopt a national market definition for retail services. Indeed, even most of the input markets the merger opponents allege are themselves either local or global, but not national.

¹⁵⁹ It was in reaction to these AYCE plans that AT&T developed a number of its own no-contract GoPhone offerings. **[Begin Confidential Information]**

[End Confidential Information] and AT&T recently announced its first prepaid smartphone. Christopher Decl. ¶¶ 53, 58.

2. The Commission Should Retain Its Inclusive Definition of the Relevant Product Market.

The Commission has consistently evaluated wireless transactions “using a combined ‘mobile telephony/broadband services’ product market.”¹⁶⁰ The merger opponents urge the Commission to reverse course and fragment its market analysis in various ways—for example, by defining separate “prepaid” and “postpaid” markets¹⁶¹ or a separate “smartphone” market.¹⁶² What all these gerrymandered market definitions have in common is a clear intent to exclude industry-altering mavericks from the competitive analysis. The Commission should reject these proposals and reaffirm its inclusive market-definition precedent, which recognizes that all providers offer differentiated but mutually competitive services. The merger opponents’ narrower approach would not only contradict Commission precedent, but would make no sense even as an original matter, would be too amorphous to permit meaningful analysis, and, in key respects, would not even succeed in excluding the industry mavericks that their cramped definition is intended to exclude.

Proposals to define a “smartphone service” market. Free Press would narrow the relevant product market to “smartphone” services, but however Free Press might wish to use that term, the Commission deliberately includes within its market analysis “mobile voice and data services provided over less advanced earlier generation (*e.g.*, 2G, 2.5G) legacy wireless

¹⁶⁰ *AT&T/Centennial Order*, 24 FCC Rcd at 13932 ¶ 37; *Verizon/Alltel Order*, 23 FCC Rcd at 17470 ¶ 46.

¹⁶¹ *E.g.*, Sprint Petition at 11.

¹⁶² *E.g.*, Free Press Petition at 2 (proposing “smartphone” market); Public Knowledge Petition at 20-22 (proposing to distinguish between mobile data and mobile voice/text markets).

networks” in addition to 3G or 4G smartphone services.¹⁶³ The Commission uses this inclusive approach because, as it notes, there are substantial “risks associated with defining product markets too narrowly, since doing so may thwart . . . pro-competitive deals that take place in the context of rapidly evolving markets and services.” *Verizon/Alltel Order*, 23 FCC Rcd at 17470 ¶¶ 45-46; *see also AT&T/Centennial Order*, 24 FCC Rcd at 13932 ¶ 37. That approach makes abundant sense: this market does not stand still long enough to accommodate snapshot-in-time definitions based on specific technologies.

In any event, even if the Commission *did* define the relevant product market as “smartphone” services, that market’s participants would now include the key regional and no-contract providers that merger opponents disparage as competitively irrelevant. As the following examples and others illustrate, wireless providers that have spectrum and network assets—including those that market only to customers in specific geographic areas—can and do respond to the skyrocketing consumer demand for mobile data by aggressively deploying nationwide smartphone services featuring high-end devices.

¹⁶³ *AT&T/Centennial Order*, 24 FCC Rcd at 13932 ¶ 37; *Verizon/Alltel Order*, 23 FCC Rcd at 17470 ¶ 46. The Commission has already rejected proposals to bifurcate the analysis into separate “telephony” and “data” markets, as a few merger opponents appear to propose. First, on the demand side, the Commission has found that “consumers typically receive mobile voice and data services on a single end-user device and purchase these services from a single provider. . . . [M]obile wireless subscribers who use their handsets for data services typically purchase these services as either an add-on to voice services or as part of a bundled voice and data plan; in some cases, they may not be *able* to purchase data services independent of voice services.” *See Fourteenth Report*, 25 FCC Rcd at 11411 ¶ 22 (emphasis added). Second, on the supply side, U.S. providers commonly provide a combination of nationwide (or nearly nationwide) voice and data services, as discussed in the text.

For example, after beating Verizon to market with the first LTE smartphone, *MetroPCS* has now “introduced 4G LTE service in all of [its] major metropolitan areas.”¹⁶⁴ Indeed, Android smartphones constituted “approximately 30% of [MetroPCS’s] gross additions in the first quarter” of 2011.¹⁶⁵ Similarly, in August 2010, *Leap* (Cricket) “fundamentally transformed [its] business to better align it with the new market realities,” including “the demand for data services [that] has exploded across the entire industry.”¹⁶⁶ Leap reports great success in that regard. In the first quarter of 2011, 40 percent of Leap’s new subscribers purchased 3G smartphones, and it intends to introduce “three or four” new smartphone models within the next few months.¹⁶⁷ Leap customers can use their 3G service not only in their home markets, but nationwide, across regions containing 280 million people.¹⁶⁸ Leap has achieved this nationwide voice and data capability by virtue of its own network infrastructure and those of its roaming partners, including MetroPCS. Pub. Int. St. at 86. Leap CEO Doug Hutcheson added in May 2011 that Leap’s “LTE implementation is now well underway” and that the company expects “consumer-oriented affordable LTE devices t[o] become more broadly available” in 2012.¹⁶⁹

¹⁶⁴ *MetroPCS May 3, 2011 Earnings Call Tr.* at 4; Press Release, *MetroPCS to Launch Metro USA Nationwide Coverage* (Nov. 4, 2010) <http://investor.metropcs.com/phoenix.zhtml?c=177745&p=irol-newsArticle&ID=1491639&highlight=>. The provider’s “Metro USA” service—which allows MetroPCS customers to “enjoy unlimited talk, text and Web services wherever they go in the nation”—now covers 280 million people. *Id.*

¹⁶⁵ *MetroPCS May 3, 2011 Earnings Call Tr.* at 3.

¹⁶⁶ *Leap May 4, 2011 Earnings Call Tr.* at 2, 8.

¹⁶⁷ *Id.* at 5, 7.

¹⁶⁸ Cricket, *Cricket Announces Launch of Nationwide 3G Data Roaming* (Oct. 19, 2010), <http://www.mycricket.com/press/press-release/Cricket-Announces-Launch-of-Nationwide-3G-Data-Roaming>.

¹⁶⁹ *Leap May 4, 2011 Earnings Call Tr.* at 8.

Likewise, *U.S. Cellular* offers its customers nationwide 3G data roaming, and smartphones now account for 42% of current sales.¹⁷⁰ In May 2011, the company announced that it was accelerating its LTE deployment plans and intends to build out LTE to 25-30 percent of its subscribers by November 2011,¹⁷¹ together with a new portfolio of attractive 4G devices.¹⁷² Meanwhile, *Cellular South* touts its “[n]ationwide [d]ata [c]overage,” most of it in 3G with no roaming fees. Pub. Int. St. at 90. It boasts that its “Smartphone Unlimited Plan is a first-of-its-kind value! Get unlimited talk, text, email and web at a price that saves you over \$40/month compared to AT&T or Verizon.” And it lures customers away from AT&T by proclaiming that, “[f]rom coast to coast, we’ve handpicked the best networks to give you better coverage in far more places than AT&T.” *Id.* Cellular South recently announced partnerships with LightSquared and Samsung that will give Cellular South “a nationwide 4G-LTE footprint”¹⁷³ and its customers “a first-class LTE experience” through new Samsung 4G LTE handsets to be

¹⁷⁰ United States Cellular, Annual Report (2010 10-K), at 6 (Feb. 25, 2011) (“*U.S. Cellular 2010 10-K*”); Conference Call Tr., *TDS—Q1 2011 Telephone and Data Systems Inc. Earnings Conference Call*, Thomson StreetEvents, at 6 (May 6, 2011) (“*U.S. Cellular May 6, 2011 Earnings Call Tr.*”).

¹⁷¹ See *US Cellular May 6, 2011 Earnings Call Tr.* at 4.

¹⁷² Greg Kumparak, *US Cellular to Launch 4G LTE Network by the Holidays*, MobileCrunch (May 6, 2011), <http://www.mobilecrunch.com/2011/05/06/us-cellular-to-launch-lte-network-by-the-holidays/>.

¹⁷³ Press Release, *LightSquared and Cellular South Announce They Have Entered into a Bilateral Roaming Agreement* (Apr. 20, 2011), <https://www.cellularsouth.com/news/2011/20110419b.html>.

introduced later this year.¹⁷⁴ In short, the smartphone segment itself is dynamic and highly competitive.

Proposals to define separate “prepaid” and “postpaid” markets. In a particularly transparent effort to banish MetroPCS and Leap from the competitive analysis, Sprint and other merger opponents argue that providers of “pre-paid” services *do not even compete* with AT&T and T-Mobile USA in what they call “a separate post-paid wireless product market.”¹⁷⁵ Senior Sprint executives tell a different story. CEO Dan Hesse observes that “what’s happening in the industry [is] *prepaid as a whole is beginning to cannibalize post-paid.*”¹⁷⁶ Another Sprint executive remarked in 2010 that, “[w]ith almost 60 million people now on prepaid service, the no-contract market has clearly moved beyond the credit-challenged and lower income segments. The prepaid market has changed dramatically, with customers across multiple demographics and lifestyles demanding a wide variety of handsets, features, and plans tailored to their specific needs and wants.”¹⁷⁷ As these observations attest, there are not separate “prepaid” and “postpaid” markets” because, whatever historical difference there may have been several years

¹⁷⁴ Press Release, *Cellular South announces strategic alliance with Samsung Telecommunications to build LTE 4G high-speed wireless broadband data network infrastructure* (Nov. 17, 2010), <https://www.cellularsouth.com/news/2010/20101117.html>.

¹⁷⁵ Sprint Petition at 14; *see also* Media Justice Petition at 5; RCA Petition at 10.

¹⁷⁶ Conference Call Tr., *Sprint Nextel Corp. Q1 2010 Earnings Call*, Seeking Alpha (May 1, 2010) (emphasis added), <http://seekingalpha.com/article/202141-sprint-nextel-corp-q1-2010-earnings-call-transcript?part=qanda>.

¹⁷⁷ Press Release, *Sprint’s Prepaid Multi-Brand Strategy Focuses on Distinct Customer Segments* (May 6, 2010), <http://seekingalpha.com/instablog/647141-sprint-nextel/68273-sprint-s-prepaid-multi-brand-strategy-focuses-on-distinct-customer-segments> (“*Sprint May 2010 Press Release*”) (quoting Dan Schulman, president of Sprint’s prepaid services). Schulman added: “This is the year that prepaid moves to the forefront of the wireless industry. . . . In the first quarter of 2010, more than half of the mobile gross additions in the U.S. selected prepaid, and we predict that approximately 70% of the net adds in 2010 will choose plans without a contract.” *Id.*

ago, contract and no-contract providers compete vigorously today for many of the same customers, and this is confirmed by the rate at which consumers are switching from contract carriers to non-contract carriers.

As an initial matter, “postpaid” and “prepaid” are inexact labels that, for the most part, no longer meaningfully distinguish different forms of wireless service. A customer’s payment mechanism—and specifically whether he or she pays before or after receiving service—is hardly a market-defining feature. Instead, when industry analysts and participants use the terms “prepaid” and “postpaid” today, they are referring to a different issue: whether the customer purchases a term contract. Under “contract” plans, a subscriber agrees to purchase service over some extended period (such as one or two years) and in exchange typically receives a lower handset price subsidized by the carrier. Under “no-contract” arrangements, the subscriber typically receives less (or no) handset subsidy but does not commit to purchasing service beyond the current month.¹⁷⁸ But this is not a market-defining attribute either. Although some customers may prefer one approach or the other, the same is true of many other differences among wireless service plans. For example, some customers may prefer to pay more up front for large buckets of voice minutes (or international calls or text messages) with no overages, whereas others may prefer to pay less up front with occasional overages. Just as those distinct

¹⁷⁸ “No contract” is a term of art to describe services that customers can buy for immediate use without any obligation to continue buying them over a specified term. Of course, no-contract providers and their customers still enter into service agreements that cover other aspects of their relationship.

preferences do not create separate markets for “large bucket” and “small bucket” wireless services, neither do preferences for contract vs. no-contract services.¹⁷⁹

Merger opponents nonetheless disparage the competitive significance of no-contract services by lumping them together with more traditional “prepaid” services, introduced years ago, when they generally had no data component and came with a fixed quantum of minutes that a customer might have to “refill” several times a month (depending on usage). But today’s leading no-contract services bear almost no resemblance to that stereotype and a very strong resemblance instead to conventional contract services. MetroPCS and Leap, for example, have pioneered “all-you-can-eat” plans that free no-contract customers from any need to worry about “running out” of minutes and having to buy new allotments. Instead, customers can sign up for unlimited plans with automatic month-to-month renewals linked to credit cards or other automated payment mechanisms—options that are very similar to traditional monthly payment mechanisms used for contract customers.¹⁸⁰ Just as important, no-contract providers like MetroPCS and Leap now offer not only voice and text, but sophisticated smartphones and data services similar to those offered by contract providers, as discussed above.

¹⁷⁹ See, e.g., *Murrow Furniture Galleries, Inc. v. Thomasville Furniture Indus., Inc.*, 889 F.2d 524, 528 (4th Cir. 1989) (rejecting claim that product attributes falling along “a spectrum of price and quality difference[s]” define different markets) (internal quotation marks omitted). Sprint and others argue that contract services differ from no-contract services in that credit approval is often needed for the former but not the latter. Sprint Petition at 11-12; AAI Comments at 6-7. But precisely because no-contract services have “clearly moved beyond the credit-challenged and lower income segments,” *Sprint May 2010 Press Release*, they are attracting increasing numbers of subscribers that would otherwise choose contract services, as confirmed by the market data discussed below. That fact can and does constrain contract pricing.

¹⁸⁰ See MetroPCS, *Customer Support / Pay Your Bill*, http://www.metropcs.com/customer_support/pay_your_bill.aspx.

Sprint also tries to exclude no-contract providers from the competitive analysis on the theory that their roaming policies differ from those of contract providers, *e.g.*, Sprint Petition at 12-13, but its arguments on that point are both factually misleading and economically irrelevant. First, it asserts that MetroPCS customers are assessed retail roaming fees in “large swaths of the country.” *Id.* at 13. By this term, Sprint can only mean rural areas that are “large” in terms of geography but not population. In particular, Sprint does not contest that MetroPCS offers service for a flat monthly fee, *without* retail roaming charges, in areas covering approximately 90 percent of the U.S. population.¹⁸¹ Likewise, despite Sprint’s contrary suggestion, Leap also offers nationwide plans without additional roaming charges for areas covering most of the U.S. population.¹⁸² In any event, to the limited extent that some providers charge retail roaming fees in some contexts—or charge a few dollars a month extra to avoid them—that is only one factor among many that consumers consider when they choose among competing plans, just as they consider whether they wish to pay a higher monthly rate for a large bucket of minutes with no

¹⁸¹ See Pub. Int. St. at 83 (citing Carlton Decl. ¶ 104); Press Release, *Leap Wireless International, Inc. and MetroPCS Communications, Inc. Enter into National Roaming Agreement and Spectrum Exchange Agreement and Settle Litigation* (Sept. 29, 2008), <http://phx.corporate-ir.net/phoenix.zhtml?c=191722&p=irol-newsArticle&ID=1203113&highlight=>; see MetroPCS Coverage Map, <http://www.metropcs.com/coverage>; Metro USA FAQs, <http://www.metropcs.com/plans/metrousa/faq.aspx>; MetroPCS Rate Plans, <http://www.metropcs.com/plans/default.aspx?tab=family>).

¹⁸² Press Release, *Cricket Footprint Grows with Premium Extended Coverage, Forming Largest Roaming Coverage Area for a Low-Cost, Unlimited Carrier* (Nov. 13, 2008), <http://www.mycricket.com/press/press-release/Cricket-Footprint-Grows-with-Premium-Extended-Coverage-Forming-Largest-Roaming-Coverage-Area-for-a-LowCost-Unlimited-Carrier>; *About Leap; Company History* (visited June 7, 2011), http://www.leapwireless.com/11_about_leap.htm. Other providers such as U.S. Cellular and Cincinnati Bell also offer similar nationwide plans without retail roaming fees for areas covering most of the U.S. population. See, *e.g.*, Carlton Decl. ¶¶ 112, 115.

overage fees or a lower monthly rate for a smaller bucket with some call-by-call overage fees.

These factors are not remotely market-defining.

Taking the opposite tack, some merger opponents separately argue that the no-contract services offered by MetroPCS and Leap must exist in a separate market because their prices are often significantly *lower* than the contract services offered by AT&T, T-Mobile USA, and others.¹⁸³ This is incorrect. As an initial matter, the true price differential is smaller than these opponents suggest because contract services generally offer a greater initial handset subsidy than no-contract services, and contract providers make up the difference through higher monthly rates collected over time. In any event, it would make no sense to define a product market so as to exclude lower-priced services that are winning share at the expense of more traditional, higher-priced services. “Courts have repeatedly rejected efforts to define markets by price variances or product quality variances. Such distinctions are economically meaningless where the differences are actually a spectrum of price and quality differences.”¹⁸⁴

In short, the no-contract services offered by MetroPCS, Leap, and others closely resemble, and are highly substitutable with, the traditional contract services sold by AT&T and others. And in part because no-contract services now share so many features with contract services, AT&T and other contract providers are losing increasing numbers of contract customers to no-contract providers like MetroPCS and Leap. Indeed, **[Begin Confidential Information]**

¹⁸³ See, e.g. Sprint Petition, CRA Decl. ¶ 40; Free Press Petition at ¶¶ 9-10.

¹⁸⁴ *Murrow Furniture Galleries*, 889 F.2d at 528 (internal quotation marks omitted); see also *AD/SAT v. Associated Press*, 181 F.3d 216, 228 (2d Cir. 1999) (“significant price differences do not always indicate distinct markets; 2A Phillip E. Areeda, et al., *Antitrust Law* ¶ 562c, at 262 (2007) (“Products can be near-perfect substitutes even when their prices or qualities differ.”)).

[End

Confidential Information] *Id.*; see also Christopher Decl. ¶ 48.¹⁸⁵ Indeed, T-Mobile USA restructured its retail operations in part to meet the new challenges posed by MetroPCS in such markets as Miami. Alling Decl. ¶ 12.

MetroPCS and Leap themselves emphasize to investors and consumers that their services are highly substitutable with traditional contract services. MetroPCS boasts that, as it rolls out high-end smartphones coupled with all-you-can-eat plans, it is bringing its customers “a postpaid experience without a contract,”¹⁸⁶ and it now reports that “a third of the gross additions that [MetroPCS is] seeing are coming from the low end of the traditional contract carrier post-pay plans.”¹⁸⁷ MetroPCS further predicts that the no-contract model will supplant the contract model altogether: “[W]e are seeing an ongoing shift toward no-contract wireless service. . . . At some point, there isn’t a need for a contract obligation when a customer is looking at a sub-\$200, fully featured 4G Smartphone.”¹⁸⁸ And MetroPCS reports that, because of these and other

¹⁸⁵ This evidence flatly contradicts the speculation of Sprint’s economists that “it is unlikely that a sufficient number of users of postpaid plans would switch to prepaid plans.” Sprint Petition, CRA Decl. ¶ 40.

¹⁸⁶ Sue Marek, *MetroPCS’ COO on the pros and cons of the AT&T/T-Mobile deal*, FierceWireless (Mar. 30, 2011), <http://www.fiercewireless.com/story/metropcs-coo-pros-and-cons-attt-mobile-deal/2011-03-30#ixzz1IgC781mV>.

¹⁸⁷ Conference Call Tr., *PCS-MetroPCS Communications, Inc. at Raymond James Institutional Investors Conference*, Thomson StreetEvents, at 3 (Mar. 7, 2011).

¹⁸⁸ *MetroPCS May 3, 2011 Earnings Call Tr.* at 5.

developments, it has “morphed into more of a full national type carrier.”¹⁸⁹ Similarly, Leap reports that it is “seeing an accelerating shift from postpaid to prepaid” and predicts that “companies like ours [will] continue to lead the shift from postpaid to prepaid, as consumers reexamine the value proposition and the consumer flight to value continues.”¹⁹⁰ In sum, now more than ever, the Commission should define this market inclusively to encompass all these mutually competing services.

C. The Transaction Will Not Result in Anticompetitive Unilateral or Coordinated Effects.

The Commission analyzes horizontal mergers to determine whether an increase in retail market concentration will create one of two types of anticompetitive harm—either “coordinated interaction” or “unilateral effects.”¹⁹¹ As discussed below, this transaction will have neither effect. In Section II.D, we then rebut the merger opponents’ related but distinct argument that this transaction will harm retail competition indirectly by impairing rivals’ access to wholesale inputs.

¹⁸⁹ *MetroPCS May 17, 2011 JPM Conf. Tr.* at 2.

¹⁹⁰ Conference Call Tr., *LEAP - Q1 2010 Leap Wireless International Earnings*, Thomson StreetEvents, at 3, 8 (May 6, 2010) (“*Leap May 6, 2010 Earnings Call Tr.*”). Indeed, many of the supposed service distinctions that merger opponents cite in advocating separate “postpaid” and “prepaid” markets could just as easily be invoked to define T-Mobile USA out of any market that includes AT&T. For example, merger opponents note that the customers of no-contract providers are, on average, younger and have lower incomes than the average AT&T customer—but the same is true of T-Mobile USA customers. Carlton Decl. ¶ 89, Table 2.

¹⁹¹ “Unilateral effects are those that result when a merged firm finds it profitable to alter its behavior by increasing prices or reducing output,” whereas “[c]oordinated interaction consists of actions by a group of firms that are profitable for each of the firms involved only because the other firms react by accommodating these actions rather than attempting to undercut them.” *Verizon/Alltel Order*, 23 FCC Rcd at 17484 ¶ 82 nn.298, 299.

1. The Wireless Marketplace Is Highly Competitive.

As established in the Public Interest Statement, the wireless ecosystem ranks among the most vibrantly competitive sectors of the American economy. First, industry output is exploding with the surge in demand for mobile broadband services. Pub. Int. St. at 65. Second, every year, revolutionary new mobile devices, applications, and technologies relentlessly reshape the marketplace. *Id.* Third, quantity-adjusted prices—for voice, messaging, and, most of all, data—have plummeted for years, all amid efficient industry consolidation. *Id.* at 65-67. Fourth, network providers have invested tens of billions over the past few years to meet surging demand, despite a severe recession. *Id.* at 67. Fifth, wireless advertising is aggressive and ubiquitous. *Id.* at 67-68. Sixth, competition in the wireless ecosystem is intensely multi-dimensional, involving endless permutations of networks, devices, operating systems, and mobile applications, as well as great variety in service characteristics, price levels, price structures, and other terms and conditions of service. *Id.* at 68-69.

Developments reported after the filing of the Public Interest Statement further confirm the strength of competition among mobile service providers. In the first quarter of 2011, Sprint, MetroPCS, and Leap all posted some of their strongest results to date—even while T-Mobile USA lost another 471,000 net contract customers on top of the 318,000 it had already lost in the fourth quarter of 2010 (*see* Section II.C.2, *infra*).

First, ***Sprint*** announced that, “during the first quarter of 2011, [it] achieved its best total company wireless net subscriber additions in five years,” adding “more than 1.1 million total wireless net subscribers” to the Sprint brand (wholesale and retail) and achieving its “best ever

postpaid churn of 1.81 percent.”¹⁹² As Sprint CEO Dan Hesse observed, “[w]e’ve added two million wireless subscribers over the past two quarters. In spite of Verizon’s iPhone launch and aggressive competitive responses to it, our simple and unlimited plans, 4G leadership, strong customer service, and successful multi-brand strategy drove solid Sprint performance for the quarter.”¹⁹³ And Sprint has plenty of room to continue its phenomenal recent growth. The combined spectrum position of Sprint and Clearwire is far stronger than AT&T’s today and will remain stronger than the combined company’s after this transaction closes. In Hesse’s words, the Sprint/Clearwire spectrum alliance “put[s] us in the strongest place for the future”¹⁹⁴ and even allows Sprint to “add LTE . . . on top of the WiMAX network.”¹⁹⁵ Sprint’s successes are, to put it mildly, difficult to square with its predictions of an AT&T-Verizon duopoly.

Meanwhile, the leading no-contract providers—*MetroPCS* and *Leap*—have rapidly expanded into markets covering (between them) more than 200 million people. *See* Carlton Decl. ¶ 102; Christopher Decl. ¶¶ 60-62. *MetroPCS*, the nation’s first commercial LTE provider, announced that it had a “record 1.5 million net subscriber additions in 2010” plus an astounding 725,000 net additions in the first quarter of 2011 alone.¹⁹⁶ It has now expanded its

¹⁹² Press Release, *Sprint Nextel Reports First Quarter 2011 Results* (Apr. 28, 2011), http://newsroom.sprint.com/article_display.cfm?article_id=1879.

¹⁹³ *Id.*

¹⁹⁴ *Hesse Mar. 24, 2010 Keynote*.

¹⁹⁵ *Sprint’s 4G Move*. The two companies’ spectrum combined gives Sprint access to an average of more than 190 MHz nationwide and more than 260 MHz in some markets. *See* Pub. Int. St. at 81 n.115.

¹⁹⁶ *MetroPCS May 3, 2011 Earnings Call Tr.* at 5.

customer base from about 500,000 subscribers in 2002 to more than 8.9 million today,¹⁹⁷ in localities as diverse as Miami, Detroit, Flint/Saginaw, San Francisco, Shreveport, Las Vegas, Los Angeles, Dallas, New York, Philadelphia, Atlanta, and many others. And it boasts that it has “morphed into more of a full national type carrier” by deploying “a national footprint that is embedded in all of our rate plans for the everyday low price that we offer our customers” and placing itself “on the forefront of deploying 4G technologies.”¹⁹⁸ According to AT&T estimates, MetroPCS now has double-digit shares and has surpassed T-Mobile USA in a number of key markets, including **[Begin Confidential Information]**

[End Confidential Information] See Pub. Int. St. at 84.

Leap also continued its impressive growth in the first quarter of 2011, adding 331,000 net customers.¹⁹⁹ It has now expanded its base from 1.47 million to 5.8 million customers in seven years (a compound annual growth rate of nearly 22 percent), serving such markets as Houston, San Antonio, El Paso, Memphis, Denver, Dayton, Savannah, Nashville, Albuquerque, Buffalo, Boise, Wichita, and Washington, D.C., among many others.²⁰⁰ Leap offers a wide array of

¹⁹⁷ Conference Call Tr., *MetroPCS Communications Inc. at Bank of America Credit Conference*, Thomson StreetEvents at 13 (Nov. 17, 2010); Press Release, *MetroPCS Reports First Quarter 2011 Results* (May 3, 2011), <http://investor.metropcs.com/phoenix.zhtml?c=177745&p=irol-newsArticle&ID=1558297&highlight=> (“*MetroPCS Reports First Quarter Results May 3, 2011*”).

¹⁹⁸ *MetroPCS May 17, 2011 JPM Conf. Tr.* at 2.

¹⁹⁹ Press Release, *Leap Reports First Quarter Results* (May 4, 2011), <http://phx.corporate-ir.net/phoenix.zhtml?c=191722&p=irol-newsArticle&ID=1559644&highlight=> (“*Leap Reports First Quarter Results May 4, 2011*”).

²⁰⁰ *Id.*; Press Release, *Leap Reports Results for Fourth Quarter and Full Year 2004; Company Provides Preliminary Results for the First Quarter of 2005 and Revised Full-Year Outlook*, at 9 (May 11, 2005), <http://phx.corporate-ir.net/phoenix.zhtml?c=191722&p=irol-newsArticle&ID=721622&highlight=>.

Blackberry, Android and other devices,²⁰¹ has nationwide 3G data coverage,²⁰² and is in the process of upgrading to LTE. *See* Pub. Int. St. at 87-88.

One recent statistic underscores the remarkable rise of these two no-contract providers. Between them, MetroPCS and Leap added a remarkable 1.057 million net retail subscribers in the first quarter of 2011 for cell phones, smartphones, laptop USB adaptors, and other personal computing devices, many of them from contract providers such as AT&T and T-Mobile USA.²⁰³ Significantly, that figure is greater than the *combined* net retail additions (postpaid and prepaid) by *both AT&T and Verizon* for these same types of subscribers (1.026 million).²⁰⁴ And both providers have told investors that they confront no near-term capacity obstacles to continued growth. MetroPCS expresses confidence that, although it intends to purchase additional spectrum rights in the future, it has the spectrum it needs to continue its growth for the next “two or three years.”²⁰⁵ Similarly, Leap’s CEO told investors in May 2011 that “we’re in good shape”

²⁰¹ Leap, *Shop Phones*, <http://www.mycricket.com/cell-phones2>; *see* Conference Call Tr., *LEAP—Q4 2010 Leap Wireless International Earnings Conference Call*, Thomson StreetEvents, at 8 (Feb. 22, 2011), (“*Leap Feb. 22, 2011 Earnings Call*”).

²⁰² Press Release, *Cricket Announces Launch of Nationwide 3G Data Roaming* (Oct. 19, 2010), <http://www.mycricket.com/press/press-release/Cricket-Announces-Launch-of-Nationwide-3G-Data-Roaming>.

²⁰³ *See* Leap Wireless Intl., Quarterly Report (1Q 2011 10-Q) at 32 (May 6, 2011) (330,574 net retail subscriber additions); MetroPCS 2011 Form 10-Q at 27 (May 6, 2011) (725,945 net retail subscriber additions).

²⁰⁴ *See* AT&T Inc., Quarterly Report (1Q 2011 10-Q) at 22 (May 6, 2011) (147,000 net retail subscriber additions, excluding reseller and connected device subscribers); Verizon Communications Inc., Quarterly Report (1Q 2011 10-Q) at 26 (Apr. 28, 2011) (879,000 net retail subscriber additions).

²⁰⁵ *MetroPCS May 3, 2011 Earnings Call Tr.* at 9.

with respect to spectrum and that “I don’t see [us] as having spectrum issues in the next couple of years[.]”²⁰⁶

A variety of additional regional providers likewise compete to provide consumers nationwide voice and data services. For example, *U.S. Cellular* serves over six million customers across 26 states,²⁰⁷ offers a wide range of advanced smartphones (and is releasing 8 new smartphones over the next 2 quarters),²⁰⁸ and is upgrading its network to LTE for 2012.²⁰⁹ According to AT&T estimates, U.S. Cellular likewise has double-digit shares and more subscribers than T-Mobile USA in such markets as **[Begin Confidential Information]**

[End Confidential

Information]. *Cellular South* continues to grow and has signed deals with Samsung and LightSquared to upgrade its current 3G services to 4G LTE.²¹⁰ And *Cincinnati Bell* is estimated

²⁰⁶ *Leap May 4, 2011 Earnings Call Tr.* at 16.

²⁰⁷ *U.S. Cellular 2010 10-K* at 1.

²⁰⁸ Telephone and Data Systems, *First Quarter 2011 Results and 2011 Guidance* at 8 (May 6, 2011), <http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9OTI2NTd8Q2hpbGRJRDR0tMXxUeXBIPtM=&t=1> (“*U.S. Cellular 1Q 2011 Results*”); Press Release, *U.S. Cellular to Launch the LG Optimus U, Its Latest Android-Powered Device For 2010* (Dec. 7, 2010), <http://www.uscellular.com/about/press-room/2010/USCELLULAR-TO-LAUNCH-THE-LG-OPTIMUS-U-ITS-LATEST-ANDROID-POWERED-DEVICE-FOR-2010.html>; USCellular.com, *Data and Internet*, <http://www.uscellular.com/plans/data.html>.

²⁰⁹ *U.S. Cellular 2010 10-K* at 7; see also Comments of CTIA-The Wireless Association®, *Wireless Telecommunications Bureau Seeks Comment On the State of Mobile Wireless Competition*, WT Docket No. 10-133, at 71 (July 30, 2010) (“U.S. Cellular’s network coverage grew by over 100 percent, and Leap’s network growth posted not only the highest absolute gain with 59.5 million additional POPs covered, but also the highest percentage gain of over 300 percent. . . . Growth is occurring across the competitive mobile industry, and is in no way limited to the largest carriers.”).

²¹⁰ Press Release, *Cellular South announces strategic alliance with Samsung Telecommunications to build LTE 4G high-speed wireless broadband data network infrastructure* (Nov. 17, 2010), <https://www.cellularsouth.com/news/2010/20101117.html>.

to have won [Begin Confidential Information]

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All of these statistics capture, in a nutshell, the realities of today's wireless marketplace: Sprint, MetroPCS, and Leap are rapidly gaining customers while T-Mobile USA is losing customers, especially contract customers (*see* Section II.C.2, *infra*). Those providers—along with U.S. Cellular, Cellular South, and a host of others—can rapidly fill any competitive gap T-Mobile USA leaves upon the completion of this transaction. *See* Pub. Int. St. at 70-95.

Finally, quite apart from those retail competitors, the Commission should further account for the new national 4G networks that *Clearwire* and *LightSquared* are building (or poised to build) and the new wholesale/retail business models they are pioneering in conjunction with retail upstarts like Best Buy. Those companies are forming partnerships not only with facilities-based wireless companies (such as Sprint, Leap, and Cellular South), but also—of equal importance—with nontraditional retailers of wireless services. Pub. Int. St. at 92-94. Those nontraditional wireless providers include companies with formidable access to consumers, ranging from cable operators like Comcast and Time Warner Cable, with their extensive regional customer lists, to Best Buy, with its approximately 1000 retail stores throughout the United States. *See id.*

In the past, the Commission has discounted the competitive significance of MVNOs because, until recently, they have generally piggybacked off the networks of *vertically integrated* wireless competitors such as Verizon Wireless or AT&T. In that scenario, the Commission has found that “the ability of MVNOs to compete against their host facilities-based provider is

limited.”²¹¹ While we do not believe that concern remains valid even as a general matter in today’s competitive wholesale market, no such concern could possibly arise when an MVNO such as Best Buy offers service over the network of a company like Clearwire that is mainly a wholesaler. Nor could such a concern arise when cable television providers partner with Sprint or Clearwire to sell wireless service as part of a “quad play” bundle with video, high-speed internet, and digital voice service. *See* Pub. Int. St. at 92, 94. Because such wholesale-retail partnerships can have as much competitive impact as the entry of a new vertically integrated provider, it would be wholly arbitrary to include vertically integrated providers but not such partnerships within the competitive analysis.

Against this backdrop, the opponents’ reliance on market shares and concentration levels as indicia of likely anticompetitive effects is untenable.²¹² It is well-recognized that market shares and concentration “are the beginning, not the end, of the competitive analysis.”

Cingular/AT&T Wireless Order, 19 FCC Rcd at 21564 ¶ 96. Similarly, the recent revision to the Horizontal Merger Guidelines states that “[t]he measurement of market shares and market concentration is not an end in itself, but is useful *to the extent* it illuminates the merger’s likely competitive effects.”²¹³ As discussed above, those measures are even less useful in this setting than in many others, because the cost structure of this industry gives providers unusual incentives to keep prices low even in more highly concentrated markets. *See* Section II.A, *supra*. Similarly, arguments that the concentration levels “fail” the Commission’s HHI screens simply misstate the purpose of those screens, which serve as mere processing tools to “eliminate from

²¹¹ *Fourteenth Report*, 25 FCC Rcd at 11442 ¶ 32.

²¹² Media Justice Petition at 9; Public Knowledge Petition at 13-14.

²¹³ *2010 Horizontal Merger Guidelines*, § 4 (emphasis added).

further review those markets in which there is clearly no competitive harm relative to today's generally competitive marketplace.”²¹⁴

2. The Transaction Presents No Risk of Anticompetitive Unilateral Effects.

Opponents claim that the transaction will increase the combined company's unilateral ability to raise prices because, they say, AT&T will no longer need to keep prices as low to retain the customers that, in the absence of the merger, would react to a price increase by switching to T-Mobile USA as their next-best alternative.²¹⁵ These “unilateral effects” arguments in general—and the “upward pricing pressure” (“UPP”) analysis conducted by Sprint's economic team in particular—are meritless for several independent reasons.

First, as Professor Carlton explains, these arguments do not account for the substantial efficiencies the transaction will produce and the consequent downward pressure on prices. Carlton Decl. ¶¶ 133-134; Carlton Reply Decl. ¶¶ 84-85. Even in highly competitive markets, firms like AT&T that face capacity constraints and rapidly rising incremental costs will have

²¹⁴ *AT&T/Cingular Order*, 19 FCC Rcd at 21586 ¶¶ 107-08.

²¹⁵ Free Press claims that AT&T must already have exercised “market power” in 2010 because it introduced usage-sensitive plans. Free Press Petition at 16 & n.33. This is nonsense. AT&T simultaneously reduced (from \$30 to either \$25 or \$15, depending on the plan) the prices it charged for data plans sufficient to cover the data consumption of 98% of subscribers without additional fees. *See* Press Release, *AT&T Announces New Lower-Priced Wireless Data Plans to Make Mobile Internet More Affordable to More People* (June 2, 2010) (Ralph de la Vega, President and CEO of AT&T Mobility and Consumer Markets: “To give more people the opportunity to experience these benefits, we’re breaking free from the traditional ‘one-size-fits-all’ pricing model and making the mobile Internet more affordable to a greater number of people.”), <http://www.att.com/gen/press-room?pid=17991&cdvn=news&newsarticleid=30854&mapcode=financial|mk-att-blackberry-torch>. *See also* AT&T Wireless Data Plans, <http://www.att.com/shop/wireless/plans/data-plans.jsp>. And when price per megabyte is taken into account, AT&T's data prices have plunged dramatically since 2007. *See* Pub. Int. St. at 66-67.

strong incentives to raise prices (particularly for high-usage customers) or allow service quality to decline as congestion worsens (resulting in a higher quality-adjusted price of service). Either outcome would reduce consumer welfare. This transaction will thus increase consumer welfare by making those outcomes less likely.

In particular, this transaction not only poses no concerns about unilateral effects, but will affirmatively *increase* output and *lower* prices (beyond levels that would otherwise exist) by alleviating output-restricting capacity constraints. Pub. Int. St. 97-98; *see* Carlton Decl. ¶¶ 133-134; Carlton Reply Decl. ¶¶ 6, 33-38, 53, 84-85, 152. The UPP analysis offered by Sprint’s economic team essentially ignores that key factor in the analysis. UPP analysis is designed for contexts where participants do not face capacity constraints and sharply increasing marginal cost curves.²¹⁶ That analysis is *not* designed for contexts like this one, where a key provider—AT&T—faces severe capacity constraints that substantially increase the incremental costs of increasing output, and the merger will in fact result in significant downward pricing pressure. *See* Carlton Decl. ¶¶ 11, 133-134; Carlton Reply Decl. ¶¶ 68-74, 84-85. Similarly, the Sprint economic model also ignores the quality improvements the merger will produce, which will “have the effect of lowering estimates of upward pressure on quality adjusted prices (the appropriate metric for analyzing the effect of the transaction on consumer welfare).” Carlton Reply Decl. ¶ 89; *see id.* ¶¶ 68-74.

Second, quite apart from issues concerning capacity constraints, this transaction could not create anticompetitive unilateral effects for the independent reasons that T-Mobile USA is not a close substitute for AT&T and that other providers will continue to exert a significant

²¹⁶ *See* Carlton Decl. ¶¶ 141-143; Jonathan B. Baker, *Merger Simulation in an Administrative Context*, at 5 n.8 (Feb. 22, 2011), <http://ssrn.com/abstract=1790943>.

competitive check on the combined company. *See* Christopher Decl. ¶ 27; Christopher Reply Decl. ¶¶ 33-36; *see also* Carlton Reply Decl. ¶¶ 93-106. Merger opponents identify no valid basis for questioning those conclusions. And Sprint’s UPP analysis in particular does not account for the ability of rival firms like Sprint, MetroPCS, and Leap to reposition their offerings in response to an attempted post-merger price increase. *See* Carlton Reply Decl. ¶ 67.²¹⁷ Indeed, as noted, even Sprint’s economists appear to recognize the invalidity of their unilateral effects argument because they posit that the combined company would have to raise rivals’ costs to prevent large customer losses after a price increase.

Moreover, the opponents greatly overstate T-Mobile USA’s competitive influence on AT&T. As explained in the Christopher declaration, AT&T primarily responds competitively to Verizon, followed by Sprint, and increasingly to MetroPCS and Leap in markets where they compete. *See* Christopher Decl. ¶¶ 20-22, 28-31, 33-34, 36-45, 48-62. **[Begin Confidential Information]**

[End Confidential Information] Christopher Decl. ¶¶ 8, 53, 58. In contrast, AT&T has

²¹⁷ In addition, any UPP analysis is inherently sensitive to adjustments in key inputs, and Sprint’s UPP analysis exemplifies this problem. Indeed, as Professor Carlton notes, “even minor modifications” of these inputs bring the outcome “close to safe harbor levels”—*i.e.*, levels that would eliminate any need for further competitive analysis. Carlton Reply Decl. ¶ 88. More generally, UPP analyses often produce “false positive[s]”—outcomes that suggest a competitive problem that, on inspection, would be unlikely to arise or would be outweighed by countervailing benefits. *Id.* ¶ 67. For that reason, UPP is “not intended as a conclusive indicator of the potential competitive impact of a merger.” *Id.* Thus, even if the outcome of the Sprint UPP model were credited, it would at most support a further inquiry into competitive effects; it could not support a conclusion that the merger would in fact diminish consumer welfare.

not responded to any of T-Mobile USA's significant national consumer pricing and promotions in at least two years. Christopher Reply Decl. ¶¶ 33-36.

Some merger opponents claim that T-Mobile USA must be a close competitor to AT&T because it launched new advertisements targeting AT&T and other providers in late 2010.²¹⁸ But the most recent quarterly numbers show that this advertising campaign has not slowed T-Mobile USA's steady subscribership decline. In the fourth quarter of 2010, T-Mobile USA lost 318,000 net contract customers, its most significant decline to that point. Pub. Int. St. at 101. In this most recent quarter, T-Mobile USA lost an *additional* 471,000 net contract subscribers, and its blended churn rate of 3.4 percent is higher even than the churn rates of pure no-contract providers MetroPCS and Leap (each 3.1 percent).²¹⁹ While T-Mobile USA nominally gained 372,000 no-contract customers during the first quarter, the overwhelming majority of those are customers of MVNOs that use T-Mobile USA's network on a wholesale basis, and T-Mobile USA in fact suffered a net loss of T-Mobile USA-branded no-contract customers.²²⁰ As MetroPCS CFO Braxton Carter recently observed, "[e]ven without the merger, I think that T-Mobile has somewhat lost their momentum and relevance to the middle tier."²²¹ It is—in the words of Deutsche Telekom Senior Vice President Thorsten Langheim—"struggling to remain a

²¹⁸ See, e.g., Sprint Petition at 48-50; AAI Comments at 15; Media Justice Petition at 13.

²¹⁹ *Id.*; see Press Release, *MetroPCS Reports First Quarter 2011 Results*, at 1 (May 3, 2011), <http://investor.metropcs.com/External.File?t=2&item=g7rqBLVLuv81UAmrh20Mp4/a0YOVOC D81gNWeML04xcAJ3l7cHHyhq1/DtISCB3+bGtP1m1WEVCwLL/9KHA+ug==>; Press Release, *Leap Reports First Quarter Results*, (May 4, 2011), <http://phx.corporate-ir.net/phoenix.zhtml?c=191722&p=irol-newsArticle&ID=1559644&highlight=>.

²²⁰ See Roger Entner, *Entner: T-Mobile results show AT&T arrived just in time*, FierceWireless (May 9, 2011), <http://www.fiercewireless.com/print/node/95352>.

²²¹ *MetroPCS May 17, 2011 JPM Conf. Tr.* at 3.

strong competitor in the wireless marketplace. Despite marketing efforts to improve its standing, T-Mobile USA has steadily lost market share . . . over the past two years.” Langheim Decl.

¶ 11.²²²

In short, T-Mobile USA’s continued subscriber decline, particularly among contract customers, provides further confirmation that T-Mobile USA is not a particularly close competitor to AT&T; that it is “struggling for relevance” in an increasingly competitive market;²²³ and that, post-merger, other providers can attract whatever customers would otherwise be drawn to T-Mobile USA.

3. The Merger Presents No Risk of Coordinated Effects.

Some opponents glibly contend that this merger will increase the risk of “coordinated interaction” by, in their words, “reduc[ing] the number of participants from four to three” in the supposedly “national market for mobile wireless telecommunications services.” AAI Comments at 11. As an initial matter, that rhetoric, which presupposes a national market consisting of just

²²² Accord Testimony of René Obermann, CEO of Deutsche Telekom, Before the House Judiciary Committee on the Judiciary, Subcommittee on Intellectual Property, Competition and the Internet (May 26, 2011) (“To meet the exponential growth in demand for bandwidth, T-Mobile will need to move to LTE to remain competitive but the company simply does not have access to the spectrum needed to deploy LTE effectively. T-Mobile has already dedicated its existing spectrum resources to its less spectrally efficient GSM and HSPA+ networks. As it is, the company is likely to face a spectrum crunch in several key markets in the coming years on those technologies alone, even without the move to LTE. With this backdrop, Deutsche Telekom had to make some difficult decisions. Remaining a competitive force in the U.S. wireless marketplace was going to require a very significant capital investment in both spectrum and infrastructure. However, it has becoming increasingly apparent that the prospect of additional spectrum becoming available for acquisition is uncertain at best. Even if available, such an acquisition would have forced Deutsche Telekom to reallocate funds from our core European operations into T-Mobile USA – which would have been very difficult for us given our overall group debt situation and our capital investment needs in Europe.”).

²²³ Carlton Decl. ¶ 130 (quoting *J.P. Morgan January 2011 Analysis* at 18).

four providers, ignores the Commission’s longstanding recognition that wireless competition is properly analyzed on a local level. And in each of the relevant local markets, this transaction will have widely varying effects, depending on the competitive dynamics in each market, including the number of competitors, the competitive importance of AT&T and T-Mobile USA, the other firms capable of entry, and all the other factors critical to the competitive analysis.²²⁴ The opponents’ “four-to-three” rhetoric is therefore meaningless. And to the extent that this rhetoric reflects concerns that the transaction will marginalize smaller providers by harming their access to relevant input markets, those concerns are baseless for the reasons discussed in Section II.D below.

These considerations, standing alone, refute arguments that the transaction could somehow produce anticompetitive coordinated effects. Precisely because the relevant retail markets are local, not national, each local market is populated by widely varying combinations of providers with widely varying market shares. As Professor Carlton explains, the local variability of that market structure, by itself, would make any effective coordination effort among the so-called “national providers” unlikely. *See* Carlton Decl. ¶ 152; Carlton Reply Decl. ¶¶ 93-99; Pub. Int. St. at 96.

In any event, as Sprint’s economic team has previously recognized, a “reduction in the number of firms and [an] increase in concentration is not by itself a sufficient basis for

²²⁴ The Commission has rightly avoided establishing any categorical minimum number of competitors necessary for effective competition. Instead, the Commission analyzes all factors relevant to the competitive analysis of markets, including not only the number of competitors, but also the current and projected shares of those competitors, prospects for new competitive entry, and the extent of merger-generated efficiencies. *Verizon/Alltel Order*, 23 FCC Rcd at 17461-62, 17487-88 ¶¶ 28, 91. The Commission then “balance[s] these factors on a market-specific basis, and consider the totality of circumstances in each market.” *Id.* at 17488 ¶ 91.

concluding that coordinated interaction is likely in a market like this with no history of coordination.”²²⁵ And the wireless industry in particular has none of the features that could plausibly give rise to coordination concerns. *See* Carlton Decl. ¶¶ 146-152; Carlton Reply Decl. ¶¶ 89-106; *see also* Willig Decl. ¶ 48. The industry’s defining characteristics are quickly changing market conditions and highly differentiated services with myriad variables. These characteristics would make coordination and the detection and punishment of cheating all but impossible. And they are the exact opposite of the conditions in which the courts, the Commission, and other regulatory authorities have found potential for coordination.²²⁶

Among other considerations, the wireless marketplace is rapidly expanding, and mobile broadband technologies are highly dynamic rather than static. *See* Section II.C.2, *supra*. As Professors Carlton and Willig explain in their separate declarations, the dynamic nature of the industry and technological flux would severely complicate any attempt to coordinate the price

²²⁵ Sprint/Nextel Application for Transfer of Control, *Applications of Nextel Commc’ns, Inc. and Sprint Corp. for Consent to the Transfer of Control of Entities Holding Commission Licenses and Authorizations Pursuant to Sections 214 and 310(d) of the Communications Act*, WT Docket No. 05-63, Declaration of Stanley M. Besen, Steven C. Salop and John R. Woodbury ¶ 131 (filed Feb. 8, 2005) (“*Sprint/Nextel CRA Decl.*”).

²²⁶ *See Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 238 (1993) (“[t]acit coordination is facilitated by a *stable* market environment, *fungible* products, and a *small number of variables* upon which the firms seeking to coordinate their pricing may focus.”) (emphasis added); *see also SBC/AT&T Order*, 20 FCC Rcd at 18365 ¶ 137 (“we also are unpersuaded that SBC/AT&T and Verizon/MCI, in particular, will have the ability to coordinate to de-peer a sufficient number of their backbone rivals – either through targeted and serial de-peering or global de-peering – to effectively ‘tip’ the market to duopoly. We conclude that it would be difficult for the merged SBC/AT&T and Verizon/MCI to agree tacitly on the specifics of these de-peering strategies, such as which peers to target, and in which sequence, without reaching an express agreement in clear violation of antitrust laws.”); Public Interest Statement, Declaration of Robert D. Willig, Jonathan M. Orszag, & J. Loren Poulsen, *Applications of AT&T Inc. and Centennial Communications Corp. For Consent to Transfer Control of Licenses, Authorizations, and Spectrum Leasing Arrangements*, WC Docket No. 08-246, ¶¶ 49-54 (Nov. 21, 2008) (“*AT&T/Centennial Willig Decl.*”).

and attributes of service offerings. *See* Carlton Decl. ¶ 151; Carlton Reply Decl. ¶ 91; Willig Decl. ¶ 48. Indeed, Sprint’s current economic team previously reached the same conclusion when Sprint defended its merger with Nextel, observing that “[c]oordinated interaction is less likely to succeed in wireless telephony because of the dynamic nature of the market.”²²⁷

In addition, pricing in the wireless marketplace is complex and multidimensional. Firms compete not only on absolute price levels, but on a range of other variables as well, including price structure, service quality, operating systems, and handsets. *See* Carlton Decl. ¶¶ 149-152; Carlton Reply Decl. ¶ 91. Again, Sprint’s experts made exactly that point in a prior proceeding: “reaching and enforcing an agreement may be complicated by the complexity of price plans.”²²⁸ For example, as anyone who has recently watched television or read a newspaper is aware, AT&T and its rivals vigorously compete on many dimensions, including promotional discounts, handset characteristics, handset subsidies, service quality, coverage, data speeds, data tiers, rollover minutes, the definition of “nights and weekends,” and friends-and-family features, among many other variables. *See* Carlton Decl. ¶¶ 149-152. In short, the multi-dimensional nature of wireless competition would make it next to impossible to pursue any effective “coordination” arrangement.²²⁹

²²⁷ *Sprint/Nextel CRA Decl.* ¶ 135.

²²⁸ *Id.* ¶ 132.

²²⁹ Free Press contends that “[t]here is already ample evidence of coordinated conduct” because “the major wireless providers all nearly simultaneously increased per-text prices” in 2006 and 2008. Free Press Petition at 36 n.87. That is nonsense. To begin with, the price “increases” to which petitioners refer were far from “simultaneous,” but instead took place over the course of several months. *See* Statement of Wayne Watts, Senior Executive Vice President & General Counsel, AT&T Inc., before the Sen. Subcomm. on Antitrust, Competition Policy & Consumer Rights, Comm. on the Judiciary, *Hearing on Cell Phone Text Messaging Rate Increases and the State of Competition in the Wireless Market*, at 5 n.8 (June 16, 2009). In any

Moreover, particularly given the dynamic nature of the market and the multi-dimensional nature of competition, providers would have overwhelming incentives to “defect” from any hypothetical (and exceedingly unlikely) coordination agreement. For example, they could do so by introducing new pricing plans, improving service, deploying new infrastructure, or meeting consumer demand for the next innovation in handsets. *See* Carlton Decl. ¶¶ 149-152.

Opponents respond that the transaction will somehow make coordinated conduct easier by removing a “maverick” from the marketplace, by which they mean T-Mobile USA.²³⁰ That argument fails for two independent reasons. To begin with, even if T-Mobile USA were a “maverick,” the exit of a “maverick” can have competitive significance only if a market is otherwise conducive to coordination—which, for the reasons discussed, this market is not.

Just as important, T-Mobile USA is not a “maverick” in the antitrust sense. *See* Carlton Decl. ¶ 154-57. MetroPCS and Leap *are* mavericks because they are rapidly gaining market share through low prices, attractive devices, and innovative no-contract services. As Professor Carlton explains, however, T-Mobile USA cannot qualify as a maverick because, among other considerations, it is steadily *losing* market share despite recent efforts to reverse that trend. Carlton Decl. ¶¶ 121-127. T-Mobile USA offers some low-priced services, but they are generally not as low-priced as those of MetroPCS, Leap, and other providers. T-Mobile USA offers mobile broadband services, but it has no commercially feasible path to LTE, the premier next-generation broadband technology. *See* Section I.A.1.d, *supra*.

event, wireless providers have not “increased” text-messaging prices in any meaningful sense, let alone on a coordinated basis. Instead, they have sharply *decreased* those prices, once the analysis accounts for text-messaging plans, which represent how the overwhelming majority of AT&T’s customers purchase text messaging services. *Id.* at 4-5.

²³⁰ *See, e.g.,* Public Knowledge Petition at 36-37.

Several opponents point to a handful of cases in which, they say, T-Mobile USA's pricing moves affected AT&T's pricing and competitive actions in significant ways.²³¹ That misstates the facts. As Mr. Christopher explains in his Reply Declaration, AT&T has not **[Begin Confidential Information]**

[End Confidential Information] Christopher Reply Decl. ¶¶ 33-36.

Finally, as part of their "maverick" rhetoric, the merger opponents also greatly overstate the role that T-Mobile USA has played, or could play, in wireless innovation.²³² In contrast to AT&T, which pioneered the smartphone revolution, T-Mobile USA lagged in its provision of 3G services.²³³ Although T-Mobile USA helped introduce HSPA+, that technology is nearing the end of its deployment cycle.²³⁴ The most significant mobile network innovations in the coming years will be driven increasingly by the transition to LTE technologies. But because T-Mobile USA today has no clear path to LTE, it would be unlikely to contribute significantly to those innovations in the absence of this transaction. Even opponents' claims about T-Mobile USA's *past* innovations are overstated. Merger opponents point to T-Mobile USA's partnership with Google to sell the first Android devices (the HTC G1) and to support the Nexus One smartphone. But the G1 post-dated devices such as the iPhone and was not a success.²³⁵ Merger opponents

²³¹ See, e.g., CERC Petition at 24-25; Sprint Petition at 32; Alarm.com Petition at 1-3, 12-14.

²³² See, e.g., Sprint Petition, CRA Decl. ¶¶ 129.

²³³ *DT Jan. 20, 2011 Analyst Briefing* at 2-3.

²³⁴ See Larsen Decl. ¶ 27.

²³⁵ More than six months after the release of the G1, Android's worldwide market share among smartphones was less than 3%, far behind iOS, Windows, and other operating systems. Prince McLean, *Canalys: iPhone outsold all Windows Mobile phones in Q2 2009*, AppleInsider

tout T-Mobile USA’s support for Unlicensed Mobile Access (“UMA”) technology, but many others are leading the evolution of this program, and customers have not widely accepted it.

D. The Merger Will Not Harm Competitors’ Access to Relevant Input Markets.

Sprint and others argue that the transaction will enable the combined company—either alone or in combination with Verizon—to harm competition by raising rivals’ costs in various inputs, such as handsets, roaming, and backhaul. Most of these arguments are old wine in new bottles. For example, Sprint and others have argued for years that ownership of wireline special access facilities enables AT&T and Verizon to raise their wireless rivals’ costs or engage in anticompetitive price squeezes. Those arguments have never had merit; they have always flown in the face of market dynamics; and their proponents identify no credible basis for concluding that the transaction will increase any incentive or ability of the combined company to act anticompetitively. The same is true for the other inputs the opponents cite, including handsets and roaming.

1. The Merger Will Not Harm Competitors’ Access to the Global Handset and Equipment Marketplace.

Sprint and others argue that the merger will undermine wireless competition and innovation on the theory that it will enable AT&T and Verizon to deprive competitors of desirable handsets and smartphones. The argument comes in two flavors: (1) with respect to legacy GSM/UMTS services, opponents say that the merger of the two largest GSM/UMTS carriers will give the combined company the ability to foreclose rivals’ access to competitive

(Aug. 29, 2009), http://www.appleinsider.com/articles/09/08/21/canalys_iphone_outsold_all_windows_mobile_phones_in_q2_2009.html. Of course, the Android operating system subsequently enjoyed great success once additional Android devices were introduced by Verizon and Sprint.

GSM/UMTS handsets; and (2) with the transition to LTE, the opponents claim that AT&T and Verizon together will have the ability to gain exclusive access to cutting-edge LTE handsets (either through the exercise of monopsony power or control of the standards-setting process), and will thus have the ability to restrict competition from all other competitors. These arguments do not withstand scrutiny, and the second is not even plausibly related to this transaction.

GSM/UMTS handsets. As an initial matter, many of these same parties have been arguing since 2007 that the Commission should prohibit exclusive handset arrangements, and these parties predicted then, as they do here, that wireless competition would collapse without regulatory intervention.²³⁶ Notably, however, Sprint not only voiced no concerns about exclusive arrangements, but vehemently opposed restrictions on them, explaining that “handset exclusivity promotes competition among carriers and manufacturers and results in innovative products that benefit the American mobile phone market.”²³⁷ The Commission wisely refrained from imposing restrictions on the terms of handset distribution arrangements, and, four years later, it is clear that the dystopian predictions that exclusive arrangements would harm competition were wrong, and that Sprint and other supporters of exclusive arrangements were right.

²³⁶ See, e.g., *Rural Cellular Association Petition for Rulemaking Regarding Exclusivity Arrangements Between Commercial Wireless Carriers and Handset Manufacturers*, RM No. 11497 (filed May 20, 2008); Skype Communications S.A.R.L., *Petition to Confirm A Consumer’s Right To Use Internet Communications And Software And Attach Devices To Wireless Networks*, RM-11361 (filed Feb. 20, 2007).

²³⁷ Sprint-Nextel Comments, *Petition for Rulemaking Regarding Exclusivity Arrangements Between Commercial Wireless Carriers and Handset Manufacturers*, RM-11497, at ii (filed Feb. 2, 2009) (“*Sprint-Nextel Exclusive Handset Comments*”).

Exclusive handset arrangements pose no risk of competitive harm because both the wireless and device marketplaces are competitive—and because the latter is global.²³⁸ In this dynamic environment, such arrangements foster innovation and competition: they encourage device makers and carriers to work together to optimize the functionality of devices on different networks, and exclusivity gives the carrier incentives to promote the device as vigorously as possible.²³⁹ That cooperation and risk-sharing also provides incentives for handset manufacturers to invest in innovation. Willig Decl. ¶¶ 11, 39-41.

Moreover, when an exclusive device is successful, other device makers and carriers respond by redoubling their own efforts to design and introduce even more innovative and attractive devices. Willig Decl. ¶ 40. The iPhone experience is instructive. “When the iPhone entered the market it shocked the carriers and presented a fundamental challenge to other handset makers. . . . The only place OEMs could turn—the only real choice they had—was Android. And they embraced the platform with gusto. Verizon, seeing consumers head to AT&T to get the iPhone, embraced once-rival Google and developed a brand for its Android handsets. The company spent millions to build consumer awareness around ‘Droid.’ . . . Without the iPhone (and Apple’s AT&T exclusivity) Android would just not be where it is today.”²⁴⁰ All carriers and consumers benefit from this intensely competitive and innovative activity. Indeed, even

²³⁸ See, e.g., Comments of AT&T Inc., *Petition for Rulemaking Regarding Exclusivity Arrangements Between Commercial Wireless Carriers and Handset Manufacturers*, RM-11497, at 7-21 (filed Feb. 2, 2009) (“*AT&T Exclusive Handset Comments*”).

²³⁹ Willig Decl. ¶ 56; see also *Sprint-Nextel Exclusive Handset Comments* at 11-13.

²⁴⁰ Greg Sterling, *What's Behind Android's Success: the iPhone*, Internet2Go - An Opus Research Advisory Service (Nov. 8, 2010), at <http://internet2go.net/news/carriers/whats-behind-androids-success-iphone>.

Sprint has, until now, consistently emphasized that there is no evidence that smaller carriers cannot offer the full range of handsets that customers want.²⁴¹

In any event, history refutes the merger opponents' time-worn attacks on exclusivity arrangements. Despite the prevalence of such arrangements over the past several years, wireless competition is more intense today than it has ever been, smaller carriers are growing instead of fading away, and *all* carriers have access today to an astonishing variety of cutting edge handsets, tablets, and other special-purpose wireless devices that could barely be imagined a few years ago.

Sprint's economists try to show otherwise by citing the number of smartphones offered by U.S. Cellular, MetroPCS, and Leap Wireless in 2009.²⁴² That argument flies in the face of today's competitive realities. To begin with, even in 2009, a wide variety of wireless providers had already begun offering attractive smartphones, as Sprint itself has previously recognized.²⁴³ In any event, the very wireless providers that Sprint cites as victims of handset foreclosure have made clear that they do not in fact face any difficulty obtaining cutting-edge handsets for their customers. For example, U.S. Cellular's CFO recently explained that "the Android power devices that we introduced beginning in the second half of last year have put us in a very strong, competitive position relative to others."²⁴⁴ MetroPCS recently observed that "[m]ore OEMs [handset manufacturers] are interested in working with us. . . . [W]e have continued engagement

²⁴¹ See *Sprint-Nextel Exclusive Handset Comments* at 5-6.

²⁴² Sprint Petition, CRA Decl. ¶ 105.

²⁴³ See *Sprint-Nextel Exclusive Handset Comments* at 5-6.

²⁴⁴ *US Cellular May 6, 2011 Earnings Call Tr.* at 9.

every week with them developing the next models, the next handsets to come out.”²⁴⁵ Indeed, it was MetroPCS that obtained and offered the first LTE smartphone available in the United States.²⁴⁶ Leap has also seen “[h]igher upgrade volumes driven by availability of smartphones.”²⁴⁷ Cellular South and Samsung have entered into a “strategic alliance” to build out Cellular South’s 4G network and “for Samsung Mobile, the No. 1 mobile phone provider in the U.S., to supply Cellular South with two LTE Band Class 12 4G smartphone handsets as well as other new and innovative network solutions operating in the 700 MHz spectrum.”²⁴⁸

Indeed, “despite its current size ‘disparity,’” with both AT&T and Verizon, Sprint itself “has been highly successful in obtaining desirable handsets for its customers” and “has entered into many different exclusive distribution arrangements, such as the HTC EVO 4G, which launched in June 2010 to ‘rave reviews.’” Willig Decl. ¶ 57. Sprint drove this point home in June 2011, when it “announced a reinvigorated alliance” with Motorola and touted plans to “launch more than 10 new Motorola wireless devices in 2011,” including the Photon 4G and the

²⁴⁵ *MetroPCS May 3, 2011 Earnings Call Tr.* at 9.

²⁴⁶ See Press Release, MetroPCS and Samsung Mobile Unveil the Samsung Galaxy Indulge, the World’s First Commercially Available 4G LTE Android Smartphone, at 1 (Feb. 9, 2011), <http://investor.metropcs.com/External.File?t=2&item=g7rqBLVLuv81UAmrh20Mp9tj3fGPzw7Th9QbgJ4ulFgfATjGENyIQJOg7zJGrl5P0Oj0RwhYxIGvk14TD9Iz3A==>.

²⁴⁷ Earnings Presentation, Leap Wireless International, Inc., *1Q11 Earnings Conference Call* at 9, <http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9OTIyNT8Q2hpbGRJRD0tMXxUeXBIPtM=&t=1>.

²⁴⁸ Press Release, *Cellular South Announces Strategic Alliance With Samsung Telecommunications To Build LTE 4G High-speed Wireless Broadband Data Network Infrastructure* (Nov. 17, 2010), <https://www.cellularsouth.com/news/2010/20101117.html>.

Motorola TRIUMPH, “the first Motorola device available exclusively to Virgin Mobile USA customers.”²⁴⁹

There is similarly no merit to Sprint’s claim that the merged entity will obtain “an advantage in bidding for the exclusive right to distribute an innovative handset model” because the “per unit cost of acquiring such exclusive rights is higher for Sprint than for AT&T.”²⁵⁰ As Professor Willig explains:

The handset manufacturer is seeking to maximize its own profits, which will depend critically on the price it is paid for the handset *and* the unit sales of the handset. As noted, the manufacturer focuses on whether the wireless carrier will have the ability and incentive to promote *its* device, in light of the number of other devices the carrier is currently promoting and distributing. A carrier’s current base of subscribers is not necessarily an indicator of the number of subscribers that would purchase a new exclusive handset from the carrier and, in fact, the prospect of adding new subscribers from rivals may be a driving force in obtaining an exclusive for a new handset. This is especially true if a carrier already has multiple exclusive distribution agreements in place – as the [Sprint] foreclosure theory would require—and may be unwilling or unable to devote significant marketing resources for an additional exclusive handset.

Willig Decl. ¶ 58. It is therefore implausible, even as a theoretical matter, to “presume that a carrier’s current base of subscribers is the most important force behind handset manufacturers’ choices of exclusive distribution partners.” *Id.*

For similar reasons, there is no basis for the contention²⁵¹ that this transaction will suddenly give AT&T monopsony power in some relevant handset market (or “duopsony” power

²⁴⁹ Sprint Press Release, *Sprint and Motorola Forge Renewed Business Relationship that Extends Device Innovation* (June 9, 2011), http://newsroom.sprint.com/article_display.cfm?article_id=1942; see also Ginny Mies, *Motorola Unleashes Photon 4G, Triumph: Two Hot New Android Phones*, PCWorld (June 9, 2011), http://www.pcworld.com/article/229899/motorola_unleashes_photon_4g_triumph_two_hot_new_android_phones.html/.

²⁵⁰ Sprint Petition, CRA Decl. ¶ 106.

²⁵¹ See, e.g., Public Knowledge Petition at 34; Free Press Petition at 34; MetroPCS Petition at 58-59; RCA Petition at 19-20.

shared with Verizon). Indeed, if there were such a basis, RIM presumably would not be supporting this transaction.²⁵² The market for GSM handsets is *global*, and because GSM is the standard that is used in most countries throughout the world today, the potential customer base for GSM handset makers is vast.²⁵³ There are at least 35 companies from all over the world designing and manufacturing handsets for sale,²⁵⁴ with new firms entering this marketplace every year, and they make devices for the literally billions of consumers worldwide that rely on GSM evolution networks.²⁵⁵ Indeed, three of the world's five largest handset manufacturers report the share of handsets they sell in the United States, and in each case they sell more outside than inside the United States: RIM sells less than 40 percent of its devices in the U.S., Apple sells less than 30 percent of its iPhones in the U.S., and Nokia sells less than one percent of its phones and devices in the U.S.²⁵⁶ Handset manufacturers have every incentive to develop

²⁵² *Avaya et al. Letter.*

²⁵³ See, e.g., *China Mobile Users Pass 600 Million, Fueled by Rural Areas*, Bloomberg (Apr. 21, 2011), <http://www.bloomberg.com/news/2011-04-20/china-mobile-passes-600-million-subscribers-on-rural-additions.html>; Report and Order, *Bundling of Cellular Customer Premises Equipment and Cellular Service*, 7 FCC Rcd 4028 ¶ 18 & n.28 (1992) (finding no prospect that exclusive dealing agreements could “eliminate international and national CPE providers”).

²⁵⁴ See Letter from Christopher Guttman-McCabe, CTIA, to Marlene H. Dortch, FCC, *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, WT Docket No. 08-27, RM-11361, at 1 (filed Mar. 20, 2008).

²⁵⁵ See, e.g., GSM World Website, <http://www.gsmworld.com/technology/index.htm> (“GSM is now used in 219 countries and territories serving more than three billion people[.]”). In the first quarter of 2011 alone, 428 million mobile communications devices were sold worldwide. See Press Release, *Gartner Says 428 Million Mobile Communications Devices Sold Worldwide in First Quarter 2011, a 19 Percent Increase Year-on-Year* (May 19, 2011), <http://www.gartner.com/it/page.jsp?id=1689814>.

²⁵⁶ RIM 2011 Annual Report at 11, http://www.rim.com/investors/documents/pdf/annual/2011rim_ar.pdf; Chris Foresman, *Verizon, AT&T sold less than 30% of iPhones shipped in 1Q 2011*, *ars technica* (Apr. 21, 2011), <http://arstechnica.com/apple/news/2011/04/verizon-att-sold->

internationally popular handsets and adapt each model to different markets around the world, and it is relatively inexpensive to enable handset chipsets to work on particular networks in different countries. These global manufacturers will therefore continue making attractive GSM devices for carriers all over the world, and there is no prospect that AT&T—which, post-merger, will represent only about three percent of global subscribers and handset sales—could somehow distort this international marketplace. *See* Willig Decl. ¶ 12, 47.

In particular, contrary to Sprint’s assertions,²⁵⁷ AT&T would not remotely have enough bargaining power to force all of these competing manufacturers to forsake AT&T’s wireless competitors and refuse to sell them any of these devices. Willig Decl. ¶¶ 46-60.²⁵⁸ Handset manufacturers compete through innovation. Even if AT&T *could* induce a manufacturer of an innovative handset to enter into an exclusive distribution arrangement, that would cause competing manufacturers to respond by creating alternative handsets with similar or superior features that they would offer to AT&T’s rivals. *Id.* ¶ 40. Indeed, if a wireless provider tried to monopolize exclusives and foreclose its competitors from access to devices, that strategy would only diminish each successive manufacturer’s interest in dealing exclusively with that “device hog” and increase its incentives to explore relationships with other carriers that, unlike the device hog, would vigorously promote its products. Willig Decl. ¶ 53. As discussed, that is exactly

less-than-30-of-iphones-shipped-in-q1-2011.ars; Press Release, *Nokia Q1 2011 net sales EUR 10.4 billion, non-IFRS EPS EUR 0.13 (reported EPS EUR 0.09)* (Apr. 21, 2011), <http://press.nokia.com/2011/04/21/nokia-q1-2011-net-sales-eur-10-4-billion-non-ifrs-eps-eur-0-13-reported-eps-eur-0-09/>.

²⁵⁷ Sprint Petition, CRA Decl. ¶¶ 106-07.

²⁵⁸ As the Commission has noted elsewhere, exclusive handset agreements apply to specific models, not to a manufacturer’s full line of smartphones. *Fourteenth Report*, 25 FCC Rcd at 11595 ¶ 317.

what happened after AT&T obtained an exclusive arrangement for the iPhone: Verizon, seeing consumers head to AT&T to get the iPhone, embraced once-rival Google and developed a brand for its Android handsets. . . . Without the iPhone (and Apple’s AT&T exclusivity) Android would just not be where it is today.”²⁵⁹

Merger opponents cannot cure the deficiencies in their arguments by postulating that AT&T and Verizon will suddenly act together to deprive Sprint and other carriers of access to handsets. *See, e.g.*, Sprint Petition at 37 & CRA Decl. ¶¶ 14, 92, 106. As Professor Willig explains in his accompanying declaration, the type of coordination postulated by Sprint would be deeply unstable and is therefore exceedingly unlikely to arise. Willig Decl. ¶ 48; *see also* Carlton Reply Decl. ¶¶ 89-106. And, in any event, given the global nature of the handset marketplace, it is highly unlikely that AT&T and Verizon *could* jointly ‘lock up’ the supply of popular handset models,” Willig Decl. ¶ 59 (emphasis added), even if market dynamics would otherwise permit such an improbable coordination effort.

Nor would the merger have any impact on handset innovation.²⁶⁰ As noted, manufacturers develop handsets for sales on an international basis. North America represents only a small fraction of the addressable market, and AT&T’s customer base is only a fraction of that fraction. Thus, even after the merger, there are numerous carriers beyond AT&T that will also contribute significantly to the development of smartphones. Willig Decl. ¶¶ 46-48.

²⁵⁹ Greg Sterling, *What’s Behind Android’s Success: the iPhone*, Internet2Go - An Opus Research Advisory Service (Nov. 8, 2010), <http://internet2go.net/news/carriers/whats-behind-androids-success-iphone>.

²⁶⁰ *See, e.g.*, Sprint Petition, CRA Decl. ¶¶ 108-13; Public Knowledge Petition at 40-41.

LTE Handsets. Monopsony or duopsony power will become even more unattainable once the wireless industry transitions to LTE. Many carriers worldwide are moving toward adoption of LTE, which means that handset makers will be able to use a single technology to reach an even more vast, global customer base.²⁶¹ With a worldwide market consisting of billions of mobile wireless subscriptions,²⁶² manufacturers will develop a plethora of LTE devices for carriers around the world. Even if AT&T and Verizon reached exclusive handset arrangements with respect to certain devices, they would have no power to force device makers to deprive other U.S. carriers of access to all appealing LTE devices developed worldwide. To the contrary, as MetroPCS recently explained, all carriers will benefit from the transition to LTE, because device makers will be able to gain even greater economies of scale in manufacturing LTE devices for a larger customer base, which means that all carriers will have access to cutting edge devices at even cheaper prices.²⁶³ In fact, MetroPCS is actively working with LTE device

²⁶¹ Clearwire complains (at 9-10) that the worldwide move to LTE has reduced device makers' incentives to make handsets for WiMAX services. But that is history, not a merger-related harm. In any event, it appears that Clearwire and Sprint are exploring whether to continue to use WiMAX in the future or to switch to LTE. If they choose to stay with WiMAX the merger changes nothing—they are already alone in the U.S. with that technology, and yet they are obtaining cutting edge WiMAX-capable devices. *See* Pub. Int. St. at 80-81 (describing Sprint's success with EVO devices and its claims that, in comparison, HSPA+ services are "faux G"). If they move to LTE, then they will be able to take advantage of the larger worldwide marketplace for such devices, especially since the 2.6 GHz band is standardized internationally for LTE.

²⁶² Press Release, *Global Wireless Subscriptions Reach 5 Billion*, iSuppli (Sept. 17, 2010), <http://www.isuppli.com/Mobile-and-Wireless-Communications/News/Pages/Global-Wireless-Subscriptions-Reach-5-Billion.aspx>.

²⁶³ *MetroPCS May 3, 2011 Earnings Call Tr.* at 5 ("With world volume of handsets on a single 4G LTE standard, we have an opportunity for substantial reductions in handset prices.").

makers today—proving once again that merger opponents are wrong when they suggest that only the handset input market is stacked against providers smaller than AT&T or Verizon.²⁶⁴

Again, global market realities would preclude AT&T alone, or AT&T and Verizon in tandem, from attaining control over handset availability and using it to curtail retail competition. Handset manufacturers have strong incentives to sell as many devices as they can, will find every opportunity to provide devices to carriers of all types, and will enter exclusive arrangements only when they determine it is in their interests to do so.²⁶⁵ As discussed above, there is no significant potential that AT&T or Verizon could singly or together amass enough global share to gain influence over enough of the many existing handset manufacturers to deny other carriers access to competitive handsets.

Some merger opponents rehash long-ago debunked arguments that AT&T and Verizon already have blocked competitors' access to handsets through the standards-setting process.²⁶⁶ According to these merger opponents, AT&T and Verizon used the standards-setting process to ensure that devices being developed to support the 700 MHz Lower B and C blocks and the 700 MHz Upper C block will not also support the 700 MHz Lower A block used by other providers. Even if these claims had merit, which they do not, they are not merger-specific and should be

²⁶⁴ See, e.g., *MetroPCS May 3, 2011 Earnings Call Tr.* at 9 (“More OEMs are interested in working with us. Continually we’re engaged with them, now multiple times a year we’re overseas, they are over here, we have continued engagement with them developing the next models, the next handsets to come out.”).

²⁶⁵ M. Katz, *An Economic Analysis of the Rural Cellular Association’s Petition for Rulemaking Regarding Exclusivity Arrangements Between Commercial Wireless Carriers and Handset Manufacturers*, at 22-24 (attached to *AT&T Exclusive Handset Comments*).

²⁶⁶ See, e.g., *MetroPCS Petition* at 60-61; *U.S. Cellular Petition* at 4-5; *RCA Petition* at 20-21.

addressed in the Commission’s pending rulemaking proceeding on this very topic,²⁶⁷ not in this company-specific merger proceeding. In any event, AT&T is not the source of the international LTE standards of which these merger opponents complain, and the remedy they seek would inefficiently increase the cost, reduce the functionality, and delay availability of LTE handsets.

The LTE device standards upon which new 700 MHz handsets are being developed were adopted in the 3rd Generation Partnership Project (“3GPP”) standards-setting process. Those standards, shaped by a host of companies throughout the industry, address what everyone agrees are significant interference issues that are unique to the 700 MHz A Block spectrum.²⁶⁸ Indeed, all parties understood prior to the 700 MHz auction that the A Band spectrum would face greater interference issues, and these parties obtained this spectrum at auction at a reduced price that reflected those concerns.²⁶⁹ The Commission has declined to adopt rules that would interfere with the standards-setting process, and as it turns out, the other carriers’ predictions that they would not be able to obtain handsets were false. Cellular South, one of the major proponents of overriding the international standards-setting body, announced recently that it is deploying its

²⁶⁷ See Public Notice, *Wireless Telecommunications Bureau Seeks Comment on Petition for Rulemaking Regarding 700 MHz Band Mobile Equipment Design and Procurement Practices*, RM-11592, 25 FCC Rcd 1464 (WTB, 2010); Comments of AT&T Inc., *700 MHz Band Mobile Equipment Design and Procurement Practices*, RM-11592, at 10 (filed Mar. 31, 2010) (“AT&T Mar 31, 2011 700 MHz Equipment Comments”).

²⁶⁸ See Comments of Motorola, Inc., *Wireless Telecommunications Bureau Seeks Comment on Petition for Rulemaking Regarding 700 MHz Band Mobile Equipment Design and Procurement Practices*, RM-11592, at 3-4 (filed Mar. 31, 2010) (“Motorola Mar. 31, 2011 700 MHz Equipment Comments”).

²⁶⁹ See Letter from Joseph P. Marx, Asst. Vice President Federal Regulatory, AT&T, to Marlene H. Dortch, Secretary, FCC, WT Docket No. 06-150; PS Docket No. 06-229; GN Docket No. 09-51; RM-11592, at 1, 4 (June 3, 2010).

own LTE network and that it had contracted with Samsung to introduce two new LTE handsets in 2011.²⁷⁰

Moreover, a merger condition requiring AT&T to deal only with manufacturers that make 700 MHz devices that are capable of operating in the yet-undeveloped A Block and all other 700 MHz spectrum blocks would succeed only in slowing consumer access to LTE services. These standards—which do not currently address the A Block—were established years ago, and AT&T and others have planned and developed their networks in accordance with these standards. If manufacturers were to change course now, AT&T would have to start over as well and conduct a new round of development, testing, trials, and implementation, setting AT&T's LTE deployment back years and exacerbating spectrum exhaust.²⁷¹

2. The Merger Will Not Lead to Higher Roaming Rates for Voice or Data Services.

Various parties cite roaming concerns as a basis for opposing this transaction or subjecting the Commission's approval to roaming conditions.²⁷² Those concerns fall into two categories, the first of which is easily dismissed at the outset.

First, some merger opponents claim that the combined company could somehow use roaming inputs to *harm competition*.²⁷³ Those arguments are baseless for the simple reason that

²⁷⁰ Press Release, *Cellular South announces strategic alliance with Samsung Telecommunications to build LTE 4G high-speed wireless broadband data network infrastructure* (Nov. 17, 2010), <https://www.cellularsouth.com/news/2010/20101117.html>.

²⁷¹ See, e.g., Verizon Comments, *Petition for Rulemaking Regarding 700 MHz Band Mobile Equipment Design and Procurement Practices*, RM-11592, at ii (filed Mar. 31, 2010) (“*Verizon Mar. 31, 2011 700 MHz Equipment Comments*”); *AT&T Mar 31, 2011 700 MHz Equipment Comments* at 10.

²⁷² See, e.g., Sprint Petition, CRA Decl. ¶¶ 52-53, 99-101; CompTel Petition at 20; Rural Cellular Petition at 17; Leap Wireless Petition at 22; Vodafone Petition at 2-3.

Sprint, MetroPCS, Leap, U.S. Cellular, and most major wireless providers in the United States—serving the overwhelming majority of customers not generally served by these applicants—use CDMA-based technologies and do not roam to any meaningful degree on the applicants’ GSM/UMTS-based networks in the first place.²⁷⁴ This merger could have no effect on CDMA roaming arrangements, let alone “tip” the whole market to “duopoly.” *See* Willig Decl. ¶¶ 61-81; Carlton Reply Decl. ¶¶ 144-154. Indeed, even if AT&T *could* somehow cause a substantial increase in the roaming rates paid by (for example) Sprint, the increase would have only a *de minimis* effect on Sprint’s per-subscriber costs and therefore could not cause a meaningful increase in retail rates. *See* Willig Decl. ¶ 75. For that and other reasons, there is no basis for Sprint’s convoluted theory that AT&T and Verizon might engage in a coordinated scheme to raise CDMA roaming rates. *Id.* at ¶¶ 73-75. The merger will also have no effect on LTE roaming arrangements, given that T-Mobile USA has no clear path to LTE—and thus no clear path to the provision of LTE-based roaming services. Any complaint that merger opponents raise about LTE-based roaming thus has no plausible relevance to this proceeding. Carlton Reply Decl. ¶ 153.

Second, other parties express a much narrower concern that the merger removes a critical competitor to AT&T in the provision of roaming to *GSM providers*, and they seek conditions designed to protect such providers.²⁷⁵ Those concerns also lack merit. The combined company will have no incentive or ability to charge unreasonable roaming rates post-merger for several

²⁷³ *See, e.g.*, Sprint Petition, CRA Decl. ¶¶ 53, 94-95.

²⁷⁴ *See Fourteenth Report*, 25 FCC Rcd at 11648 Table C-4 (listing providers by number of subscribers); http://en.wikipedia.org/wiki/List_of_United_States_wireless_communications_service_providers (listing providers by technology).

²⁷⁵ *See, e.g.*, Cincinnati Bell Petition at 25.

independent reasons: because the Commission’s roaming rules will forbid it, because the combined company (like AT&T today) will continue to *purchase* more roaming than it *sells* pursuant to *reciprocal* bilateral arrangements, and because the terms on which the company purchases roaming can serve as benchmarks in any FCC complaint proceeding brought by its roaming customers.

Specifically, every domestic roaming agreement is a bilateral agreement between two carriers,²⁷⁶ typically with a single, reciprocal rate.²⁷⁷ Even where one carrier is substantially larger, in absolute terms, than the other, the real-world experience is that the roaming rates are generally reciprocal. *See* Hague Decl. ¶ 3. AT&T itself is a case in point. While AT&T’s network has a nationwide footprint, there are significant geographic areas that AT&T’s network does not reach, and AT&T has always relied on roaming agreements to provide service in these areas. Indeed, AT&T is a *net purchaser* of roaming services, both overall and under **[Begin Confidential Information]** **[End Confidential Information]** of its individual domestic roaming agreements, and thus has an interest in *lower* roaming rates. Hague Decl. ¶ 5. That is because, although AT&T has a larger network than its roaming partners, AT&T also has more customers who roam on its partners’ networks and generate more minutes and megabytes on those networks than vice versa. Thus, the “balance of trade” favors the smaller partner, not AT&T: net cash flows from AT&T to the smaller partner. And in the minority of cases in which AT&T is a net seller of roaming services, AT&T’s practice is to

²⁷⁶ See Second Report and Order, *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile data Services*, 26 FCC Rcd 5411, 5423, ¶ 23 (2011) (“*Data Roaming Order*”).

²⁷⁷ In other words, the carrier pays the same amount per minute of use or megabyte for roaming on its partner’s network as it charges for providing roaming to its partner.

negotiate a commercially reasonable rate [Begin Confidential Information]

[End

Confidential Information]. Hague Decl. ¶ 6. AT&T's roaming agreements are generally reciprocal, and the rates paid by each carrier for roaming on the other carriers network are almost always the same, and when they are not, they are very close to one another. *Id.* ¶ 3.

For these reasons, there is no basis to concerns that, because the merger will eliminate one of the country's two nationwide GSM networks, it will create a "GSM monopoly."²⁷⁸ Again, AT&T's incentive is now—and will be post-merger—to reduce roaming rates because it is and will remain a *net purchaser* of domestic roaming services. Given the reciprocal nature of those roaming agreements, any attempt by AT&T to raise roaming rates would succeed only in increasing the outflow of money from AT&T to its roaming partners.

In any event, because of different technology choices, most GSM providers *today* do not have an effective choice of roaming partners for the 3G data-roaming services that are the primary concern of merger opponents. T-Mobile USA's current network provides all UMTS services only over the AWS spectrum, and AT&T provides its UMTS services over 850 MHz and 1900 MHz spectrum. Other GSM carriers thus have only one real choice of a national 3G/4G roaming partner because the vast majority of their customers do not have handsets that are capable of roaming on both AT&T and T-Mobile USA.²⁷⁹ Accordingly, this transaction can

²⁷⁸ See, e.g., Public Knowledge Petition at 58; USAM Petition at 9-10; RCA Petition at 16; AAI Comments at 20; Cincinnati Bell Petition at 10-11.

²⁷⁹ Hague Decl. ¶ 9; Willig Decl. ¶¶ 63-64. This is confirmed by the fact that fully [Begin Confidential Information] [End Confidential Information] of T-Mobile USA's 3G roaming revenues are attributable to [Begin Confidential Information] [End Confidential Information] and [Begin Confidential Information] [End

present no UMTS-related roaming concerns even for GSM/UMTS providers, because AT&T is already the only GSM provider with a nationwide network that can effectively accommodate the vast majority of GSM carriers for UMTS roaming purposes. Hague Decl. ¶ 9; Willig Decl. ¶¶ 62-64.

In any event, the new data roaming rules that the Commission just adopted will be more than adequate to resolve any potential disputes should they arise. Those rules require all wireless broadband providers to negotiate data roaming agreements in good faith and to offer rates and terms that are commercially reasonable.²⁸⁰ Although some opponents claim that the loss of T-Mobile USA eliminates a “benchmark” for reasonable rates, the terms on which *AT&T itself*, as a net purchaser, buys roaming from other providers can serve as benchmarks in any FCC complaint proceeding brought by its roaming customers. In any case, under the *Data Roaming Order*, roaming disputes are to be assessed under the “totality of the circumstances,” not according to any rigid formula involving “benchmarks.”²⁸¹ The merger opponents propose a requirement that roaming rates be “cost-based” or no higher than AT&T’s retail rates (or perhaps retail rates less avoided costs).²⁸² The Commission expressly rejected such standards in the *Data Roaming Order*, and for good reason: those rates would not only embroil the Commission in

Confidential Information], the two principal U.S. GSM carriers other than T-Mobile USA that use AWS spectrum for 3G service. *See* Willig Decl. ¶ 64.

²⁸⁰ *Data Roaming Order*, 26 FCC Rcd at 5423-24 ¶ 23.

²⁸¹ *Id.* at 5452-53 ¶¶ 85-86 (listing factors to be considered). Indeed, the Commission was quite clear that, in the context of data roaming, “providers can negotiate different terms and conditions, including prices, with different parties, where differences in terms and conditions reflect actual differences in particular cases.” *See id.* at 5452 ¶ 85.

²⁸² *See, e.g.,* Japan Communications Comments at 18.

complex ratemaking proceedings, but—worse—give carriers incentives to free ride on other carriers’ networks and thus refrain from making their own broadband investments.²⁸³

There is also no merit to claims that the transaction will impair access to *LTE* roaming. *First*, because T-Mobile USA has no clear path to *LTE*, the merger could not deprive other providers of an additional provider of *LTE* roaming service, at least in the foreseeable future. *Second*, there will be at least two, and possibly three, nationwide *LTE* network providers in addition to AT&T: Verizon and LightSquared are both constructing nationwide *LTE* networks—and LightSquared in particular has already signed wholesale and roaming agreements with Cellular South, Leap, and Best Buy²⁸⁴—and Sprint and Clearwire have made clear that they have enough spectrum to construct an *LTE* network of their own and may in fact do so.²⁸⁵ *Third*,

²⁸³ *Data Roaming Order*, 26 FCC Rcd at 5423, 5434-35, 5437-46 ¶¶ 22, 48, 55-68. Although Cincinnati Bell and others raise many objections about AT&T’s roaming practices, those objections are baseless. *See* Hague Decl. ¶¶ 13-23. In any event, as discussed below, the appropriate forum for raising such objections with the Commission is a complaint proceeding under the Commission’s roaming rules, not this merger proceeding.

²⁸⁴ *See, e.g.*, Press Release, *Cricket Enters into 4G Roaming Agreement with LightSquared* (Mar. 22, 2011), <http://www.lightsquared.com/press-room/in-the-news/cricket-enters-into-4g-roaming-agreement-with-lightsquared/>; Press Release, *LightSquared and Cellular South Announce They Have Entered Into a Bilateral Roaming Agreement* (Apr. 20, 2011), <http://www.skyterra.com/media/press-releases-view.cfm?id=243&yr=2011> (“‘LightSquared’s wholesale-only, integrated 4G-LTE wireless broadband and satellite network, makes them a valuable partner because it enables us to provide our customers, including those in rural locations, with nationwide access to the most advanced technology and reliable coverage available,’ said Hu Meena, president and CEO of Cellular South”).

²⁸⁵ *See* Commc’ns Daily, July 16, 2010 (Sprint CEO Dan Hesse tells Financial Times “[w]e have the spectrum resources where we could add *LTE* if we choose to do that, on top of the WiMAX network . . . [t]he beauty of having a lot of spectrum is that we have a lot of flexibility”); *see also* Kevin Flitchard, *Clearwire hints at LTE build with Sprint* (May 5, 2011), <http://connectedplanetonline.com/3g4g/news/cleawire-hints-at-lte-build-with-sprint-0505/>. Merger opponents try to dispute this fact by stating, correctly, that *LTE* will be offered on a number of different bands of spectrum and that handsets will not initially be capable of accessing

by their terms, the data-roaming rules apply to all generations of wireless data services, including LTE, and those rules further ensure that providers can obtain LTE roaming on reasonable terms.

Finally, Vodafone and the New Zealand Ministry of Economic Development ask the Commission to impose merger conditions that would regulate roaming rates that the combined company charges foreign carriers, but that would have no effect on the roaming rates that foreign carriers charge AT&T or any other U.S. carrier. These proposals are one-sided and unfounded.

International roaming agreements are the products of bilateral negotiations influenced by each carrier's "balance of trade." Hague Decl. ¶ 25. AT&T is a net purchaser under the substantial majority of its international roaming arrangements. *Id.* The rates charged by and to AT&T under international roaming agreements generally and AT&T's specific roaming agreements with Vodafone have consistently declined, and there is no reason to conclude that this merger will have any impact on this trend. *Id.* ¶¶ 26-27. Indeed, contrary to Vodafone's assertions, few of Vodafone's customers have devices that can access the AWS spectrum on T-Mobile USA's network, and Vodafone thus has no real national alternative to AT&T for 3G GSM roaming even today. *Id.* ¶ 27. And 3G usage **[Begin Highly Confidential Information]**

[End Highly Confidential Information]

Finally, contrary to Vodafone's suggestion, imposing international roaming conditions on AT&T would not replicate regulatory structures applicable to Vodafone and other foreign carriers. The EU does *not* regulate the rates that European carriers charge U.S. carriers, and European carriers have, in fact, generally raised their rates to U.S. carriers since the EU began

all these different bands. But carriers can and will work with manufacturers to obtain handsets that operate on both the spectrum that they use and that of their roaming partners.

regulating intra-EU roaming rates. Hague Decl. ¶ 29. New Zealand, too, does not now regulate the roaming rates that its carriers charge U.S. carriers, and all or nearly all other regulatory commissions in the world also do not regulate the rates that their national carriers charge for roaming services provided to U.S. operators. *Id.* The one-sided conditions that Vodafone and New Zealand urge would impede future roaming negotiations by weighing the scales heavily in favor of foreign carriers, freezing features of these integrated agreements that favor foreign carriers, and denying flexibility to US carriers in negotiating integrated agreements. *Id.* Such regulatory disparity would harm, not help, U.S. consumers. *Id.* Indeed, because the condition would apply only to services that are provided to foreign carriers and used by foreign consumers, the condition would be both unprecedented and outside the Commission’s jurisdiction.

3. The Merger Poses No Backhaul or Special Access Concerns.

Merger opponents argue that the transaction will increase AT&T’s ability and incentive to use its special access services to raise its wireless rivals’ backhaul costs or subject them to an anticompetitive price squeeze.²⁸⁶ Those backhaul-related concerns lack merit for two basic reasons. First, strong competition for the provision of backhaul services, largely driven by the need to provide high capacity wireless broadband networks with new fiber and microwave connections, deprives AT&T of any *ability* to “leverage” backhaul to harm the downstream wireless marketplace, particularly against the backdrop of regulation for legacy TDM special access. Nothing about this transaction will change that fact. In particular, T-Mobile USA is neither a provider of special access services nor a substantial enough purchaser of such services

²⁸⁶ See, e.g., Sprint Petition at 39-41 & CRA Decl. ¶¶ 96-98; AAI Comments at 20; CompTel Petition at 23-24; CCIA Petition at 14; Leap Petition at 24-25; NoChokePoints Petition at 6; US Cellular Petition at 2-3.

as to harm competition for backhaul services. Second, even if Commission were to view the backhaul marketplace as less than robustly competitive, this transaction could not increase any *incentive* AT&T might have to raise its wireless rivals' costs by charging backhaul prices above levels that it would charge absent the merger. Each of these points provides an adequate and independent basis for rejecting any backhaul-related argument for opposing the merger.

No ability to act anti-competitively. Contrary to merger opponents' assertions,²⁸⁷ significant and growing competition deprives AT&T of any "market power" that it could "leverage" in the upstream backhaul marketplace to harm competition in the downstream wireless market. The services used to perform backhaul functions (transmitting traffic between a wireless provider's cell sites and switches) are increasingly not traditional TDM-based special access services, but highly competitive Ethernet-based services that ILECs such as AT&T have no particular advantage in providing.²⁸⁸ If AT&T sought to engage in such anticompetitive conduct, its wireless rivals would have ample competitive alternatives to AT&T for their backhaul needs. That will remain as true after this transaction as before, and, as discussed below, special access regulation remains a backstop to the extent that competitive wireless

²⁸⁷ See, e.g., Sprint Petition at 39 & CRA Decl. ¶¶ 96-97; PAETEC Petition at 14-15; Japan Communications Comments at 12-14; CompTel Petition at 23; Leap Petition at 24-25; FiberTech Comments at 3.

²⁸⁸ With the D.C. Circuit's approval, the Commission has differentiated TDM-based DSn-level services from Ethernet and OCn-level services, and it has eliminated dominant-carrier regulation of the latter services on the grounds that they are highly competitive and technologically dynamic. See Memorandum Opinion and Order, *Petition of AT&T for Forbearance under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services*, 22 FCC Rcd 18705 (2007) ("Enterprise Broadband Forbearance Order"), *aff'd*, *Ad Hoc Telecomm's Users' Comm. v. FCC*, 572 F.3d 903 (D.C. Cir. 2009).

providers still rely on TDM-based backhaul in areas that may have fewer competitive alternatives.²⁸⁹

Over the past decade, the parties that have complained about special access pricing have focused on legacy TDM special access services, particularly DS1s, and the principal focus of the Commission's ongoing special access proceeding has been requests for intrusive re-regulation of these TDM services. These mid-decade complaints, however, have been overtaken by events in the wireless marketplace.²⁹⁰ That marketplace is characterized today, as the Commission has repeatedly acknowledged, by exploding demand led by the rapid growth of wireless broadband data services. Hogg Decl. ¶¶ 3, 21. To meet this demand, wireless broadband providers need high-capacity backhaul, and therefore the entire industry is increasingly turning away from

²⁸⁹ In fact, microwave alternatives to TDM special access circuits can be deployed even at more rural cell site locations, as representatives of companies throughout the industry confirmed to the Commission in its National Broadband Plan workshops. *See* Hunter Newby, *National Broadband Plan Workshop*; Deployment – Wired Transcript, at 30 (Aug. 12, 2009) (“it’s the combination of fiber and microwave, which for backhaul from towers that don’t have much fiber can cover a much larger swath of the country along this way”); Tom Sawanobori, *National Broadband Plan Workshop*; Wireless Broadband Deployment – General Transcript, at 47 (Aug. 12, 2009) (“There are microwave solutions of significant bandwidth that will support LTE and other fourth generation technologies”); *id.* at 46 (Jake MacLeod, Bechtel Telecommunications) (“Obviously, a lot of carriers now are moving to Ethernet, and wireless is definitely a solution . . . where you can’t get fiber or high-speed Ethernet solution”).

²⁹⁰ In this regard, merger opponents’ repeatedly cite T-Mobile USA’s 2007 filings in the special access proceeding as establishing that there is little competition for backhaul to wireless carriers. *See, e.g.,* Sprint Petition, CRA Decl. ¶ 50; FiberTech Comments at 5. But these comments were filed before the recent explosive growth in demand for wireless backhaul, which has since made it economic for T-Mobile USA, and other wireless carriers, to shift to Ethernet-based backhaul services that are indisputably subject to competitive supply. Mayo Decl. ¶ 2; *see also* Casto Decl. ¶ 2.

legacy TDM-based DS1s and embracing a wide variety of alternatives, including fiber and microwave Ethernet backhaul. Casto Decl., *passim*; Mayo Decl., *passim*; *see also* Willig Decl., ¶¶ 86-97.

ILECs such as AT&T and Verizon have no advantage in providing such services; in fact, most of the leading providers of these forms of backhaul services are not ILECs. Casto Decl. ¶¶ 2, 11; *see also* Mayo Decl. ¶¶ 6-9. Rather, the Ethernet playing field is fragmented and highly competitive, and industry analyst reports confirm that ILECs supply a minority of Business Ethernet ports today—no single provider has more than a 24 percent share of the overall business; seven companies have more than five percent; five of the top eight providers lost port share or remained steady in 2010, while the remaining providers gained share.²⁹¹ Fixed microwave also ranks among the most important alternative backhaul options available today; indeed, Clearwire relies on microwave for more than 90 percent of its backhaul needs.²⁹² Cable companies have also aggressively expanded into the provision of backhaul services, and the larger cable companies’ business-oriented special access offerings are now billion dollar operations.²⁹³ Additional competitors such as Level 3, XO, tw telecom, FiberTower, and Zayo

²⁹¹ Vertical Systems Group, *Year-End 2010 U.S. Business Ethernet Port Share*; *see also* Vertical Systems Group, *Mid-Year 2010 U.S. Business Ethernet Port Share* (“Continuing a trend that was identified from previous share results, Competitive Providers and Cable MSOs once again gained port share from Incumbents [ILECs]. This trend is attributed primarily to a broadening of market competition[.]”).

²⁹² Phil Goldstein, *Clearwire CTO urges infrastructure industry to focus on capacity*, FierceWireless (Oct. 5, 2010), <http://www.fiercewireless.com/story/clearwire-cto-urges-infrastructure-industry-focus-capacity-4g-networks/2010-10-05#ixzz1OJL7cVKn>; *see* Willig Decl. ¶ 91.

²⁹³ *See* Mayo Decl. ¶ 7; Mike Robuck, *Mobile Backhaul: Opportunity Knocks for Cable Operators*, CEDMagazine.com (Mar. 1, 2011) (“Mobile backhaul has been a mainstay for Cox Communications’ revenue over the past 10 years, but with the advent of the new Long Term

Bandwidth continue to compete vigorously as well.²⁹⁴ As Mr. Casto explains in his Declaration, when AT&T competes for backhaul business in today's environment, it is typically competing with a wide range of other carriers for the business, including Ethernet firms, microwave backhaul providers, and cable operators. *See* Casto Decl. ¶ 10. Prospective customers bargain aggressively, touting the competitive offers they have received from other potential suppliers, as well as their ability to self-provision. *See* Casto Decl. ¶¶ 12, 20. And since the latter part of 2009, when wireless carriers first began deploying Ethernet backhaul, AT&T has received requests for bids for backhaul to about [Begin Confidential Information] [End Confidential Information] cell sites, and it has won bids on [Begin Confidential Information] [End Confidential Information] of those sites. Casto Decl. ¶ 13.

Evolution networks, Cox and other cable operators are looking to tap into an even bigger revenue stream. Last year, the business services divisions of Cox Communications and Time Warner Cable rang up more than \$1 billion each in commercial services revenue, with cell backhaul providing significant chunks of those revenues.”), <http://www.cedmagazine.com/articles/2011/03/mobile-backhaul-cable-operators.aspx>. *See also, e.g.,* Time Warner Cable, *1Q 2011 Results*, at 7 (Apr. 28, 2011) (cell tower backhaul increased by 115.4% year-over-year), <http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9OTExNTN8Q2hpbGRJRDR0tMXxUeXBIPtM=&t=1>; Conference Call Tr., *Q1 2011 Comcast Earnings Conference Call*, Factset:callstreet, at 10 (May 4, 2011) (“[O]ur cell backhaul business is ramping nicely. . . . [Our] Metro-E[thernet] [services is] in 11 of 19 markets. . . . [W]e increased our cell backhaul towers by about 80% last year. So that business is . . . going very well.”), http://files.shareholder.com/downloads/CMCSA/1278329537x0x464890/a9432fc4-bf26-4db5-81a5-5548501e9ced/CMCSA_TranscriptQ1_5.4.11.pdf.

²⁹⁴ *See* Mayo Decl. ¶ 7; Casto Decl. ¶ 10; *see also* Comments of AT&T Inc., *Special Access Rates for Price Cap Local Exchange Carriers, AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WT Docket No. 05-25, at 15-17 (filed Jan. 19, 2010) (“AT&T Jan. 19, 2010 Special Access Comments”); Comments of Qwest Commc’ns Int’l Inc., *Special Access Rates for Price Cap Local Exchange Carriers, AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25, RM-10593, at 12-17 (filed Jan. 19, 2010).

T-Mobile USA itself is an illustrative beneficiary of this trend. As explained in the Declaration of David A. Mayo, T-Mobile USA today, as a wireless carrier unaffiliated with an ILEC, has many options for backhaul. In the past few years, T-Mobile USA, like other wireless providers, has moved aggressively to reduce its backhaul costs by seeking out Ethernet alternatives, which are more cost-effective and easily scalable. Mayo Decl. ¶ 2, 6. T-Mobile USA has found that there are many backhaul competitors in urban, suburban, and fringe areas, and although it originally contracted with microwave backhaul providers, it now focuses on Ethernet over fiber and has contracts in different cities with various cable operators, alternative fiber providers, and a wholly owned subsidiary of a utility company. *Id.* ¶¶ 6-7. Today, **[Begin Confidential Information]** **[End Confidential Information]** of T-Mobile USA's mobile broadband traffic is transported over Ethernet, and that figure is predicted to rise to **[Begin Confidential Information]** **[End Confidential Information]** by year-end 2011. Mayo Decl. ¶¶ 6, 8. Non-ILECs now provide the connections for more than half of T-Mobile USA's 3G/4G capable cell sites. *Id.*, ¶ 8. As a result of switching to Ethernet, T-Mobile USA has substantially reduced its backhaul costs. Mayo Decl. ¶ 9. AT&T also purchases backhaul for its wireless network from competitive providers and has experienced similar choice in the marketplace.

T-Mobile USA is by no means alone in moving to Ethernet and other high-capacity backhaul options. As Parley Casto explains in his declaration, all of AT&T's wireless backhaul customers are migrating their broadband cell sites to Ethernet. Casto Decl. ¶¶ 10, 12, 20. Other wireless providers have made public statements underscoring the same point. For example, US

Cellular uses microwave backhaul for at least one-third of its cell sites.²⁹⁵ Clearwire uses microwave backhaul to connect 90% of its cell sites.²⁹⁶ Leap has announced that “last mile competition and migration to Ethernet [is] expected to” significantly reduce its “relative backhaul costs.”²⁹⁷ MetroPCS is rapidly transitioning to Ethernet backhaul, and it recently entered into an agreement with Bright House Networks under which Bright House will “provide[] fiber-based Ethernet” to MetroPCS in Orlando and Tampa, Florida.²⁹⁸ Sprint is implementing “upgrade[s] in backhaul technology” and is “moving away from T1s and toward a combination of microwave and Ethernet fiber, where it’s available,” and according to Sprint, a “T1 is no longer preferred choice for backhaul.”²⁹⁹ Verizon is moving to Ethernet backhaul solutions for its LTE mobile wireless network, and has explained that “Ethernet backhaul is something we have been working very hard to get,” with Verizon Wireless’s CTO and Senior Vice President explaining that “I have been very impressed to see the amount of backhaul out

²⁹⁵ See Comments of U.S. Cellular, *Request of Alcatel-Lucent, et al For Interpretation of 47 C.F.R. § 101.141(a)(3) To Permit The Use Of Adaptive Modulation Systems*, WT Docket No. 09-106, at 1 (filed Jul. 27, 2009) (reporting approx. 2,350 microwave backhaul connections); United States Cellular Corporation, Quarterly Report (2009 10-Q), at 21 (Aug. 6, 2009) (reporting 7,043 total cell sites).

²⁹⁶ See, e.g., Phil Goldstein, *Clearwire CTO urges infrastructure industry to focus on capacity*, FierceWireless (Oct. 5, 2010), <http://www.fiercewireless.com/story/clearwire-cto-urges-infrastructure-industry-focus-capacity-4g-networks/2010-10-05#ixzz1OJL7cVKn>.

²⁹⁷ Colin Holland, *Cricket 3G/4G Strategy* (2010), <http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9NTYzMDV8Q2hpbGRJRD0tMXxUeXBIPtM=&t=1>.

²⁹⁸ See Bright House Newsroom, *Bright House Networks Supports MetroPCS Backhaul Network Evolution to Ethernet* (Feb. 28, 2011), <http://brighthouse.com/tampa-bay/about/8331.htm>.

²⁹⁹ Sue Marek, *Sprint: Decision on LTE likely in four to six months*, FierceWireless (Feb. 15, 2011), <http://www.fiercewireless.com/story/sprint-decision-lte-likely-four-six-months/2011-02-15>.

there. In one market – which isn’t a very large market – we had more than nine responses to an RFP we put out for backhaul . . . In my view, we have a very healthy ecosystem.”³⁰⁰

This transaction could not diminish any of this competition—and therefore could not give AT&T the ability it clearly lacks today to leverage its own special access services to harm downstream wireless rivals.³⁰¹ T-Mobile USA does not itself provide backhaul services to third-party wireless providers, and this merger will therefore not remove a competitive backhaul supplier from the marketplace.

Some merger opponents nonetheless advance a “customer foreclosure” theory, in which they claim that the transaction will harm special access competition by depriving AT&T’s in-

³⁰⁰ Sean Buckley, *Verizon Wireless’ ongoing LTE drive creates a lush wireline-based backhaul opportunity*, FierceWireless (May 28, 2011), <http://www.fiercetelecom.com/print/node/27236>. In all events, special access pricing plainly is not hindering downstream wireless competition. Wireless competition is flourishing, and the fastest growing carriers in the marketplace today are carriers such as Sprint, MetroPCS, and Leap/Cricket, even though each of these carriers relies on other parties for backhaul. As the D.C. Circuit has held, there is no public interest benefit to increasing regulation of access inputs for wireless service where special access prices are not preventing the downstream wireless marketplace from thriving. *USTA v. FCC*, 359 F.3d 554, 575-77 (D.C. Cir. 2004) (facts about wireless competition “clearly show that wireless carriers’ reliance on special access has not posed a barrier that makes entry uneconomic. Indeed, the multimillion dollar sums that the Commission regularly collects in its auctions of such spectrum, and that firms pay to buy already-issued licenses, seem to indicate that wireless firms currently expect that net revenues will, by a wide margin, more than recover all their non-spectrum costs (including return on capital).”) (citations omitted).

³⁰¹ That conclusion applies no less to non-price-related conduct as to pricing practices. In particular, AT&T could not discriminate in the *provisioning* of special access in a way that could harm competition unless that discrimination is noticeable to its wireless-provider customers. Special access is a mature service, standards of quality in provisioning are well-established, and wireless carriers are among AT&T’s largest and most sophisticated purchasers of these services. Any discrimination that would have any hope of affecting competition in the downstream wireless marketplace would have to be so stark and obvious that it would breach AT&T’s contractual obligations and subject AT&T to complaints.

region special access competitors of one of their largest customers, T-Mobile USA.³⁰² Notably, merger opponents offer *no* evidence that T-Mobile USA’s demand is necessary for existing competitive backhaul providers to maintain viability.³⁰³ Nor could they. First, this “customer foreclosure” argument ignores marketplace realities. T-Mobile USA’s demand for backhaul represents only a very small fraction of the total special access marketplace. In 2010, the special access marketplace represented an estimated \$36 billion in revenues. Willig Decl. ¶ 107. All wireless carriers’ backhaul demand *combined* represents only a part of the total special access marketplace, and T-Mobile USA represents only a relatively small fraction of that subset of purchasers. *Id.* In other words, even if the combined company purchased no backhaul services from non-ILEC competitors—whereas, in fact, AT&T is and will remain a substantial purchaser of competitive access, Ethernet and fiber services for backhaul and other purposes—alternative special access providers would still have billions of dollars worth of potential business. *Id.*

Moreover, even if the Commission focused only on markets within AT&T’s wireline footprint, T-Mobile USA’s demand for backhaul would *still* constitute only a small fraction of the total. Willig Decl. ¶¶ 107-109. For example, within that footprint, Verizon is a large purchaser of backhaul from AT&T’s special access competitors (a fact that further undermines any notion that the two carriers act in tandem as a duopoly). Casto Decl. ¶ 15. Sprint relies

³⁰² See, e.g., Sprint Petition at 39-41; PAETEC Petition at 11-12; Free Press Petition at 44; CompTel Petition at 25-28; NoChokePoints Petition at 7; U.S. Cellular Comments at 3; Fibertech Comments at 2-3; CCIA Petition at 12-14; Texaltel Petition at 6-7; NJ Rate Counsel Petition at 41; RTG Petition at 50; Earthlink Petition at 12.

³⁰³ See Willig Decl. ¶ 106. Further, even assuming that merger opponents could demonstrate that the “loss” of T-Mobile USA traffic might have a substantial financial impact on some competitive backhaul providers, they would also need to demonstrate that the largely sunk assets they use to provide backhaul would exit the market in order to show a harm to special access competition, *id.*, a showing they do not even attempt.

extensively on backhaul from Clearwire.³⁰⁴ The marketplace also includes backhaul for all other facilities-based wireless providers, virtually all of whom also purchase backhaul from alternative providers. And, of course, wireless carriers represent only a fraction of overall demand for dedicated transport and the merger has no impact on the ability of CLECs and other competitive providers to compete to carry traffic from enterprise carriers, large business, and other major purchasers of dedicated transport.

Third, and equally important, this is a rapidly growing market. All wireless carriers are increasing backhaul capacity because, to keep pace with exploding data demands, they are both adding new cell sites and expanding backhaul capacity at existing towers.³⁰⁵ Wireless broadband providers will shift even farther away from legacy TDM services when they deploy their LTE networks, because LTE networks will require exclusively Ethernet or other high-capacity backhaul. Casto Decl. ¶ 6.

By contrast, any effect the absence of T-Mobile USA's business might have on alternative backhaul suppliers will emerge only gradually. T-Mobile USA has almost completed an upgrade to fiber Ethernet across its network and has multi-year contracts with third-party

³⁰⁴ Sprint's 4G network relies on Clearwire's WiMAX service. And, Clearwire "runs 90 percent of its network on microwave backhaul". Phil Goldstein, *Clearwire CTO urges infrastructure industry to focus on capacity*, FierceWireless (Oct. 5, 2010), <http://www.fiercewireless.com/story/clearwire-cto-urges-infrastructure-industry-focus-capacity-4g-networks/2010-10-05#ixzz1OJL7cVKn>.

³⁰⁵ This fact also means that even if wireless carriers have committed existing demand to ILECs, they will have substantial and growing incremental demand that can be shifted to alternative providers (just as T-Mobile USA itself was able to do). Cf. PAETEC Petition. at 13-15; CompTel Petition at 27. Indeed, CompTel's recognition (at 27) that incremental demand from T-Mobile USA could be shifted to competitive providers establishes that incremental demand from many other wireless carriers needing backhaul in AT&T's territories can be shifted as well.

suppliers for such services. Mayo Decl. ¶ 7. As successor, AT&T will assume those contracts post-transaction.³⁰⁶ In any event, the quickly expanding demand for backhaul from others will more than replace the slow “loss” of T-Mobile USA’s existing backhaul purchases over time. Level 3’s CEO recently confirmed this very point, explaining that, given “the incredible growth rate” in wireless usage, there will remain “a very large opportunity for a lot of the participants in our industry” after “[t]he merger[] . . . between T-Mobile and AT&T.”³⁰⁷

To the extent that backhaul is still provided by means of TDM-based special access services, those services are already subject to an extensive set of price cap rules that ensure just and reasonable rates, and AT&T has flexibility to raise rates for such services above price-capped levels only in areas and for services where it has been shown that there are extensive facilities-based alternatives.³⁰⁸ Where it has such pricing flexibility, AT&T could not sustain anticompetitive prices for the simple reason that the backhaul marketplace is robustly competitive. Sprint and others argue that the Commission’s current rules are overinclusive and permit pricing flexibility in contexts, including wireless backhaul, where competition is insufficiently robust. Those arguments are incorrect, as AT&T has argued on many prior occasions and summarizes below; if anything, the rules are underinclusive because the price-flex

³⁰⁶ Shifting T-Mobile USA’s purchased backhaul to AT&T’s network does create efficiencies by eliminating “double-marginalization”—as Sprint’s own economists recognized in the Sprint-Nextel transaction. *See* Sprint/Nextel CRA Decl. ¶ 31. To the extent that this would result in additional deployment of fiber by AT&T to compete with existing CLEC backhaul services, that would only benefit other wireless carriers that use the cell site. Willig Decl. ¶ 110.

³⁰⁷ *See* James Crow, Level 3 CEO, Level 3 Communications' CEO Discusses Q1 2011 Results - Earnings Call Transcript (May 3, 2011), <http://seekingalpha.com/article/267352-level-3-communications-ceo-discusses-q1-2011-results-earnings-call-transcript>.

³⁰⁸ Fifth Report and Order and Further Notice of Proposed Rulemaking, *Access Charge Reform*, 14 FCC Rcd 14221 (1999) (“*Pricing Flexibility Order*”), *aff’d*, *WorldCom Inc. v. FCC*, 238 F.3d 449 (D.C. Cir. 2001).

triggers ignore non-collocating facilities-based competitors.³⁰⁹ Indeed, contrary to Sprint’s “raising rivals’ costs” theory, TDM-based prices have been declining.³¹⁰ But the Commission need not resolve that dispute in the context of this proceeding because it is already considering whether to modify its special access regulations in an industry-wide rulemaking proceeding, and arguments in favor of increased regulation should be addressed in that proceeding.³¹¹

No incentive to act anticompetitively. By itself, strong backhaul competition, coupled with existing regulation, deprives AT&T of any *ability* to leverage its special access services to harm downstream wireless competition, either before or after this transaction. That point provides a complete refutation of any “backhaul”-related argument for opposing this transaction. Some opponents attempt to spin out baroque theories of why the transaction might give the combined company *incentives* to leverage its special access services in this manner, but those arguments all fail for the threshold reason that the combined company would have no ability to

³⁰⁹ See, e.g., *AT&T Jan. 19, 2010 Special Access Comments* at 29-35 (noting that a wide range of facilities-based competitors offer special access connections today, including scores of independent CLECs, cable companies, and wireless backhaul providers).

³¹⁰ Reply Declaration of Dennis W. Carlton et al., *Special Access Rates for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25, RM-10593, at ¶¶ 19-20 (filed Feb. 24, 2010); Patrick Brogan & Evan Leo, USTelecom, *High-Capacity Services: Abundant, Affordable, and Evolving*, at 42-45 (July 2009), http://www.ustelecom.org/uploadedFiles/News/News_Items/High.Capacity.Services.pdf; Casto Decl. ¶ 5.

³¹¹ See Order and Notice of Proposed Rulemaking, *Special Access Rates for Price Cap Local Exchange Carriers*, etc., 20 FCC Rcd 1994 (2005); Public Notice – Parties Asked To Refresh Record in the *Special Access Notice of Proposed Rulemaking, Special Access Rates for Price Cap Local Exchange Carriers*, etc., 22 FCC Rcd 13352 (2007); Public Notice – Parties Asked to Comment on Analytical Framework Necessary to Resolve Issues in the *Special Access NPRM, Special Access Rates for Price Cap Local Exchange Carriers*, 24 FCC Rcd 13638 (2009); Public Notice – Data Requested in *Special Access NPRM, Special Access Rates for Price Cap Local Exchange Carriers*, etc., 25 FCC Rcd 15146 (2010).

act on those incentives even if the transaction would increase them. In any event, even if existing regulation were somehow flawed, and even if backhaul competition were less intense than it is, the opponents' arguments would *still* fail for the independent reason that AT&T would lack incentives (let alone increased incentives) to act anticompetitively, both before and after the merger.

Specifically, most merger opponents do not even attempt to show that the merger would enhance AT&T's incentives to raise its rivals' backhaul prices in order to disadvantage its non-vertically integrated rivals—an incentive that would exist today under opponents' own logic. Sprint attempts to advance such a theory, but it is especially implausible. Sprint argues that the merger will lead to reduced competition and higher prices at *retail*, and that these higher retail prices will create an incentive for AT&T to then raise Sprint's costs, so that Sprint cannot compete away the price increase.³¹² That argument rests on the premise that the opponents' *horizontal* theory of coordinated effects is valid, because coordinated conduct by Verizon (*i.e.*, raising prices rather than taking share from AT&T) is one of several necessary steps in Sprint's analysis. But that horizontal theory is invalid. As Professors Carlton and Willig each explain, the dynamic and multifaceted nature of wireless competition makes effective coordination highly improbable.³¹³

In any event, any vertical leveraging argument relating to backhaul would be foreclosed both by Commission precedent and by economic analysis. First, the Commission has repeatedly encountered and rejected prior requests to address similar "raising rivals' costs" arguments in the

³¹² Sprint Petition at 42 & CRA Decl. ¶ 14.

³¹³ Willig Decl. ¶¶ 48, 99-102; *see also* Carlton Decl. ¶¶ 146-152; Carlton Reply Decl. ¶¶ 89-106. *See* Section II.C.3, *supra*.

merger context. For example, in the AT&T-BellSouth proceeding, opponents argued that “the merger would increase the incentives of the Applicants to discriminate against Cingular’s wireless rivals because the combined company would realize the full extent of any benefits of such conduct.”³¹⁴ As the Commission explained, that argument was not appropriately addressed in a merger proceeding because, under the opponents’ theory, the pre-merger applicants “already would obtain the full benefit of any increase in Cingular’s profits that would result from raising rivals’ costs[.]”³¹⁵ Similarly, in the Cingular-AT&T Wireless merger, opponents “argue[d] that the Commission should reject the proposed merger because it will significantly increase BellSouth’s and SBC’s incentives to discriminate against Cingular’s wireless competitors in the provision of interconnection and special access services.”³¹⁶ But the Commission responded that “such a concern is more appropriately addressed in our existing rulemaking proceedings on special access performance metrics and special access pricing” so that the Commission could “develop a comprehensive approach based on a full record that applies to all incumbent LECs” and “treats similarly-situated incumbent LECs in the same manner.”³¹⁷

The Commission should reject the opponents’ backhaul-related arguments here for the same reasons. Indeed, that outcome follows *a fortiori* from the *AT&T-BellSouth* and *Cingular-AT&T Wireless* orders. In the years since those orders were adopted, backhaul competition—particularly with the shift to alternative fiber- (or microwave-) based Ethernet technologies—has become far more intense. And because T-Mobile USA is not itself a provider of backhaul

³¹⁴ *AT&T/BellSouth Order*, 22 FCC Rcd at 5695 ¶ 60 n.169.

³¹⁵ *Id.*

³¹⁶ *Cingular/AT&T Order*, 19 FCC Rcd at 21592 ¶ 183.

³¹⁷ *Id.*; accord *SBC/AT&T Order*, 20 FCC Rcd at 18319-20 ¶ 55.

services, this proceeding contains none of the issues presented in the *AT&T-BellSouth* order about increased concentration in the special access market.

In any event, the opponents' argument is unsound on its economic merits, as Professor Willig explains in his reply declaration. Under the anticompetitive strategy theorized by the opponents, the combined company would raise backhaul prices substantially above levels that would be profit-maximizing in that market in an effort to achieve even greater profits in the downstream wireless services market. But raising backhaul prices would cause the wireless providers that purchase backhaul services either to lower output or choose alternative backhaul suppliers; either way, the combined company would lose substantial backhaul business. That loss of business would be unusually costly. Because the facilities used to provide backhaul present very high fixed costs and low marginal costs, a backhaul provider saves little in the way of costs when it loses business from a customer, yet it forgoes all associated revenues. Willig Decl. ¶¶ 99-102.

There is no reason to conclude that this strategy could succeed in diverting enough business to the combined company's wireless operations to make the strategy profitable, and every reason to conclude that it would not. Special access is only a limited component of the cost of providing wireless services, and AT&T will supply only a fraction of each carrier's backhaul needs. The opponents cite no credible basis for concluding that an increase in the price of AT&T's fractional share of this single input could raise retail prices, particularly given the availability of alternatives to AT&T's backhaul services (and regulation where there are not adequate alternatives). To the contrary, Sprint's own data show that, even if AT&T *could* raise backhaul prices substantially, doing so would have no meaningful impact on Sprint's per-

subscriber costs relative to its average per-subscriber revenues.³¹⁸ In other words, AT&T could have no incentive to undertake the “raising rivals’ costs” strategy postulated by Sprint’s economists because such conduct would not enable AT&T to increase retail prices and could succeed only in depressing demand for AT&T’s special access services and prompting many purchasers of those services to switch to alternative backhaul providers. *See id.*

In any event, the opponents cannot plausibly explain why, if AT&T could accomplish a profitable anticompetitive strategy post-merger, it has not already undertaken such a strategy today. Put differently, as Professor Willig shows, merger opponents cannot demonstrate that the incremental increase in AT&T’s customer base will so fundamentally alter market dynamics as to make a previously unprofitable strategy suddenly profitable. *See Willig Decl.* ¶ 32.

In sum, the opponents’ backhaul-related bases for opposing the merger are without merit because (1) the backhaul market is subject to both robust competition and regulation and (2) in any event, the combined company would have no incentive—and certainly no *increased* incentive—to pursue the theorized anticompetitive strategy because it would likely prove unprofitable. Finally, the Commission is fully capable of using regulation, if necessary, to address any real and substantial anticompetitive access-related conduct.³¹⁹ And the threat of

³¹⁸ *See Willig Decl.* ¶¶ 99-102; *Carlton Reply Decl.* ¶¶ 123-124; *Sprint Petition*, *CRA Decl.* ¶ 96. As Sprint’s own costs make clear, unsupported claims that backhaul costs represent 30 percent of a wireless carrier’s total costs are flatly wrong. That figure originated years ago as a rough estimate of the proportion of *cell site* costs, not total costs, attributable to backhaul. And as Mr. Mayo explains in his declaration, backhaul costs per unit have themselves fallen dramatically in recent years with the transition to high capacity Ethernet backhaul connections. *Mayo Decl.* ¶ 9.

³¹⁹ *See, e.g., Notice of Proposed Rulemaking, Third Report and Order, and Notice of Inquiry, Access Charge Reform Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, Usage of the Public Switched Network by Information Service and Internet Access Providers*, 11 FCC Rcd 21354, 21475-77 ¶¶ 277-81 (1996);

such regulation will itself give the combined company powerful incentives to avoid such conduct.³²⁰

4. The Merger Poses No Threat to the Availability of Content and Apps to Other Wireless Providers or Their Customers.

Some merger opponents claim that, post-merger, AT&T and Verizon would have such control over the marketplace for wireless services that they would be able to control the adjacent marketplace for wireless applications, thus depriving competitors of the applications they would need to compete and allowing the market to tip toward duopoly. The argument is meritless. Most applications are sold through online applications stores that are independent of individual carriers and are usually associated with a particular wireless operating system. If an application has any type of success at all, most applications developers will seek to develop versions of the same application to be run on different operating system platforms and offered through different applications stores—thus cashing in on the developer’s natural incentive to sell its application as widely as possible. Christopher Reply Decl. ¶ 40. AT&T and Verizon, either singly or together,

Memorandum Opinion and Order, *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Southern New England Telecommunications Corporation, to SBC Communications, Inc.*, 13 FCC Rcd 21292, 21303-04 ¶¶ 23-24; *Bell Atlantic/GTE Order*, 15 FCC Rcd at 14124-26 ¶¶ 196-198.

³²⁰ Although not a vertical theory, Sprint’s economists also argue that financing constraints harm Sprint and other wireless carriers’ ability to compete for exclusive handset arrangements, spectrum and other inputs, and the merger will exacerbate these issues. *See* Sprint Petition, CRA Decl. ¶¶ 116-123. First, any current weakness in Sprint’s financial position today is attributable to its past business decisions, not this merger, and Sprint’s economists do not explain how the merger itself could raise Sprint’s cost of capital (let alone do so anticompetitively). In all events, Sprint is financially sound and maintains significant access to capital markets for investment and other purposes, even after the announcement of the proposed merger. Willig Decl. ¶¶ 111-117.

have no power to dictate what third-party applications can be made available to customers of *other* carriers.³²¹

Indeed, the merger will promote the overall applications marketplace. As AT&T has previously explained, AT&T devotes substantial resources to supporting the development of applications, through AT&T Labs, through its various outreach programs, and through its state-of-the-art testing centers that are available to third party developers.³²² By relieving AT&T's capacity constraints and enabling AT&T to build a broader and deeper LTE network, AT&T will have heightened incentives to pursue these initiatives and to invest in supporting the development of such applications—which will benefit the entire marketplace. Donovan Decl. ¶¶ 21-22, 43.

E. This Transaction Will Not Give the Combined Company a Disproportionate Amount of Spectrum.

1. No Rational Objective Could Be Served by Denying AT&T Access to the Spectrum It Needs to Increase Output and Support the Accelerating Demand for Next-Generation Mobile Applications.

Relying on deeply flawed statistics, various opponents argue that the transaction will give AT&T a “dominant” spectrum position. Some would block the merger altogether on the ground that the combined company will have “too much” spectrum nationwide and exploit that

³²¹ The opponents' distinct but equally baseless “net neutrality” arguments, which allege that the combined company will harm *its own customers'* access to applications and content markets themselves, are addressed in Section II.G below.

³²² Donovan Decl. ¶¶ 5, 17-27; Christopher Reply Decl. ¶ 42; *see also* Alexandre Gerber et al., AT&T, *AT&T Labs Research—Leading Invention, Driving Innovation: A Call for More Energy-Efficient Apps* (Apr. 7, 2011), http://www.research.att.com/articles/featured_stories/2011_03/201102_Energy_efficient (discussing AT&T's development of a new analytical tool that helps application developers substantially reduce the latency of their applications and the battery power that they consume, and describing positive feedback from the applications community).

advantage to the detriment of its competitors.³²³ Others suggest that the Commission should convert its spectrum screens—long used only to flag markets requiring additional analysis—into hard caps on spectrum holdings, compelling divestitures in any market where the combined company exceeds the prescribed levels.³²⁴ These arguments lack merit.

As discussed below, these opponents overstate AT&T's spectrum holdings and badly understate everyone else's, and their carrier-by-carrier comparisons are flawed for that reason alone. Moreover, their proposed outcome could only disserve the public interest. Because of its smartphone leadership and need to support three generations of technology, AT&T faces uniquely serious and urgent capacity constraints. *See* Section I.A, *supra*. The Commission would promote no rational policy objective by blocking AT&T's access to the resources it needs to expand output and support its customers' escalating demands for bandwidth-intensive mobile applications. And that outcome would be particularly perverse in this context, where, because of the unique network synergies discussed in Section I above, the combined network will far exceed the sum of its parts and generate the functional equivalent of new spectrum.

Indeed, while addressing the long-term need for new spectrum auctions, Chairman Genachowski made the following observation, which applies with equal force to those who would foreclose the output-increasing synergies of this transaction: "If we do nothing in the face of the looming spectrum crunch, many consumers will face higher prices—as the market is

³²³ *See, e.g.*, Free Press Petition at 46.

³²⁴ *See, e.g.*, U.S. Cellular Petition at 9-10. A few opponents argue that the Commission should require any divestitures to be made to them in particular, or conducted through processes that would be weighted to ensure that result. *See, e.g.*, Cincinnati Bell Wireless Petition at 29, MetroPCS Petition at 68. As discussed below, the Commission has previously rejected such proposals and should also do so here. *See* Section III.A, *infra*.

forced to respond to supply and demand—and frustrating service—connections that drop, apps that run unreliably or too slowly. The result will be downward pressure on consumer use of wireless service, and a slowing down of innovation and investment in the space.”³²⁵ Those output-suppressing, anti-consumer outcomes would serve no one’s interests—except those of AT&T’s competitors. Again, however, the “Commission’s statutory responsibility is to protect competition, not competitors.”³²⁶

In any event, AT&T will hardly have a commanding spectrum position after this merger is completed. It is particularly cynical of Sprint to claim otherwise, given that, even after the merger, Sprint and its affiliate Clearwire will still have more spectrum than the combined company.³²⁷ Sprint claims to have only 49 MHz of spectrum at its disposal for mobile broadband and telephony services and asserts that AT&T will have three times more spectrum than Sprint following the transaction. Sprint Petition at 60. That is disingenuous. Sprint ignores its interest in Clearwire, asserting in a footnote that it does not “control Clearwire’s board of directors or management and does not manage Clearwire’s operations.” *Id.* at 90 n.297. But

³²⁵ *Genachowski CTIA Remarks* at 9; *see also National Broadband Plan* at 75-106.

³²⁶ Order and Authorization, *Application of Alascom, Inc. AT&T Corporation and Pacific Telecom, Inc. for Transfer of Control of Alascom, Inc. from Pacific Telecom, Inc. to AT&T Corporation*, 11 FCC Rcd 732, 758 ¶ 56 (1995); *accord Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (antitrust rules are designed for “the protection of competition not competitors”) (internal quotation marks omitted).

³²⁷ Other providers have announced publicly that they have the spectrum they need to continue growing, at least in the near-to-intermediate term. *See, e.g., Pub. Int. St.* at 26 n.36 (quoting Verizon, Leap, and MetroPCS); *Leap May 4, 2011 Earnings Call Tr.* at 16 (affirming that “we’re in good shape” with respect to spectrum and that “I don’t see [us] as having spectrum issues in the next couple of years”); *MetroPCS May 3, 2011 Earnings Call Tr.* at 9 (affirming that, although MetroPCS intends to purchase additional spectrum rights in the future, it has the spectrum it needs to continue its growth for the next “two or three years”).

Sprint does have a 54 percent economic stake in Clearwire;³²⁸ it is “by far Clearwire’s largest customer”;³²⁹ and it relies on Clearwire’s spectrum and network to provide 4G service.³³⁰

Indeed, in explaining to the public why Sprint is “in the strongest place for the future,” CEO Dan Hesse found it appropriate to “combine Sprint’s spectrum position with Clearwire’s spectrum position” for purposes of analysis.³³¹

Clearwire likewise boasts about its spectrum position. A page from Clearwire’s own website states that, even apart from Sprint’s own licensed spectrum, “Clearwire Has More Spectrum Than Anyone”;³³²

³²⁸ On June 8, 2011, Sprint announced that it was reducing its voting rights in Clearwire to 49.8 percent from 54 percent while nonetheless “keeping its 54 percent economic interest in Clearwire.” Reuters, *Sprint reduces voting rights in Clearwire* (June 8, 2011), <http://www.reuters.com/article/2011/06/08/us-sprint-clearwire-idUSTRE75758V20110608>. Notably, even a 10 percent holding triggers the Commission’s attribution rules. See, e.g., *Sprint/Clearwire Order*, 23 FCC Rcd 17570, ¶ 77 (2008).

³²⁹ Roger Cheng, *Sprint to Pump \$1 Billion Into Clearwire*, Wall St. J. (Apr. 19, 2011), <http://online.wsj.com/article/SB10001424052748703789104576272812983215304.html>. Sprint recently cemented its wholesale relationship with Clearwire by agreeing to “pay[] at least \$1 billion over the next two years to use Clearwire’s super-fast wireless service.” *Id.*

³³⁰ *Id.*

³³¹ Hesse Mar. 24, 2010 Keynote; see also *Sprint’s 4G Move* (quoting Sprint CEO’s observation that Sprint has “the spectrum resources where we could add LTE if we choose to do that, on top of the WiMAX network. . . . The beauty of having a lot of spectrum is we have a lot of flexibility.”).

³³² Clearwire, *Our Network: Clearwire Has More Spectrum Than Anyone* (visited May 23, 2011) (“*Clearwire Has More Spectrum Than Anyone*”), <http://www.clearwire.com/company/our-network> (emphasis added).



And Sprint/Clearwire will *continue* to have the most spectrum in the industry following this transaction. Indeed, as Clearwire recently told investors, it “has the best spectrum position in the industry, on average, 160-megahertz of spectrum in the top markets. *That’s more than the combined AT&T/T-Mobile . . . company would have if their merger is approved.*”³³³

Sprint nonetheless objects that, despite what Clearwire tells its investors, much of Clearwire’s BRS/EBS spectrum in the 2.5 GHz band should be ignored because “the Commission has found [it] unsuitable for mobile telephony/broadband services in its spectrum screen analysis.” Sprint Petition at 58 n.198. But whatever determination the Commission may have made nearly three years ago, it has more recently made abundantly clear that 194 MHz of BRS/EBS spectrum *is* available for mobile telephony/broadband services. The *National Broadband Plan* identified the full 194 MHz of BRS/EBS spectrum as “now coming online for mobile broadband deployment.”³³⁴ Moreover, in the *Fourteenth Report*, the FCC included 194 MHz of BRS/EBS of spectrum in a table listing “Flexible Use Spectrum Usable for Mobile Wireless Service.”³³⁵ Sprint fares no better in attempting to discount much of Clearwire’s BRS/EBS holdings because they are leased from educators rather than licensed directly to

³³³ Clearwire May 4, 2011 Earnings Call Tr. at 5; see also *Fourteenth Report*, 25 FCC Rcd at 11570 Chart 40.

³³⁴ FCC, *Connecting America: The National Broadband Plan* at 84-85, Ex. 5-F (2010).

³³⁵ *Fourteenth Report*, 25 FCC Rcd at 11566 Table 24.

Clearwire. Sprint Petition at 68-69. Those educators typically lease almost all of their capacity to Clearwire under “total lease term[s] of up to 30 years.”³³⁶

The Commission should also reject the opponents’ efforts to treat the spectrum *screen* as though it were a spectrum *cap*—which, in an era of capacity constraints, would amount to a full-blown market-share restriction. The spectrum screen is merely a processing tool used “to eliminate from further review those markets in which there is *clearly no competitive harm* relative to today’s generally competitive marketplace.”³³⁷ It is “designed *to be conservative* and ensure that any markets in which there is potential competitive harm based on spectrum aggregation is identified and subjected to more in-depth analysis.”³³⁸ Precisely because the Commission has designed the spectrum screen to be “conservative,”³³⁹ exceeding the screen does not establish any presumption of a problem. Instead, it triggers a closer look at competitive conditions in the particular CMAs that have been identified, and it allows flexibility in addressing any competitive concerns.³⁴⁰

³³⁶ Clearwire Corp., Annual Report (2011 10-K), at 14 (Feb. 22, 2011). EBS licensees can lease up to 95 percent of their capacity for non-educational uses. *Id.*; 47 C.F.R. § 27.1214(b)(1).

³³⁷ *AT&T/Dobson Order*, 22 FCC Rcd at 20317 ¶ 39 (emphasis added).

³³⁸ *Id.* at 20313 ¶ 30 (emphasis added); *see also AT&T/Centennial Order*, 24 FCC Rcd at 23936-38 ¶¶ 46, 49-50.

³³⁹ *AT&T/Centennial Order*, 24 FCC Rcd at 13936 ¶ 46.

³⁴⁰ *Verizon/Alltel Order*, 23 FCC Rcd at 17481 ¶ 75; *see, e.g., AT&T/Centennial Order*, 24 FCC Rcd at 23937-38 ¶¶ 49-50 (rejecting request that applicants divest spectrum holdings where AT&T would meet or exceed the spectrum aggregation screen or where the merged entity would hold both cellular licenses in any market, and noting that the Commission “has previously found that reliance on case-by-case review for aggregation of spectrum and cellular-cross interests better serves the public interest than utilizing a prophylactic rule.”); *Verizon/Alltel Order*, 23 FCC Rcd at 17480 ¶ 70 (declining “to apply any heightened scrutiny to spectrum aggregation involving cellular overlaps”); *see also* Report and Order and Further Notice of Proposed Rulemaking, *Facilitating the Provision of Spectrum-Based Services to Rural Areas and*

The Commission recently found that this “reliance on case-by-case review for aggregation of spectrum and cellular-cross interests better serves the public interest than utilizing a prophylactic rule.”³⁴¹ As the Commission explained nearly a decade ago when it eliminated the spectrum cap, “overbroad, *a priori* limits on spectrum aggregation . . . may prevent transactions that are in the public interest,” and “case-by-case review . . . is . . . preferable to the spectrum cap rule because it gives the Commission flexibility to reach the appropriate decision in each case, on the basis of the particular circumstances of that case.”³⁴² For the same reason, the Commission should reject calls for a cap on the combined company’s spectrum holdings. Such a cap would arbitrarily prevent the combined company from obtaining additional spectrum as needed to serve its customers and support increasingly bandwidth-intensive applications. And this would be a particularly inauspicious moment to impose such a cap, just as the mobile broadband revolution is taking hold and consumer demand for bandwidth accelerates.

In any event, the combined company’s spectrum holdings will fall far short of levels that could support any reasonable concern about spectrum aggregation. As discussed in the Public

Promoting Opportunities for Rural Tel. Cos. to Provide Spectrum-Based Services, 19 FCC Rcd 19078, 19113 ¶ 63 (2004) (finding that “reliance on a uniform case-by-case review process for aggregations of spectrum and cellular cross interests in RSAs is currently the better approach as compared to prophylactic limits” and that “continued application of the cellular cross-interest rule in RSAs may impede market forces that could drive financing and development of new services in rural and underserved areas”).

³⁴¹ *Verizon/Alltel Order*, 23 FCC Rcd at 17480 ¶ 70.

³⁴² Report and Order, *2000 Biennial Regulatory Review, Spectrum Aggregation Limits for Commercial Mobile Radio Services*, 16 FCC Rcd 22668, 22693-94 ¶ 50 (2001) (“*Spectrum Cap Order*”); see also Notice of Proposed Rulemaking, *Service Rules for Advanced Wireless Services in the 2155-2175 MHz Band*, 22 FCC Rcd 17035, 17080 ¶ 103 (2007) (“*2155-2175 MHz NPRM*”) (noting that the Commission eliminated the spectrum cap because it “found that the cap, by setting an *a priori* limit on spectrum aggregation without looking at the particular circumstances of specific proposed transactions, was unnecessarily inflexible and could be preventing beneficial arrangements that promote efficiency without undermining competition”).

Interest Statement, the existing spectrum screen was designed at a time when substantially less spectrum was available for commercial mobile services, and the Commission has long noted the need to update that screen to reflect changes in spectrum availability.³⁴³ The Commission should now modify those screens to reflect its recent success in freeing up more spectrum for that purpose. In particular, the Commission should now include the 90 MHz of MSS/ATC spectrum and all 194 MHz of BRS/EBS spectrum, not just the 55.5 MHz it has considered before, because that spectrum is now available—or will soon be available—for the deployment of commercial mobile wireless services.³⁴⁴ For example, Clearwire and its partners have launched WiMAX service over BRS/EBS spectrum across much of the country, passing 127.8 million people in over 88 markets as of March 31, 2011.³⁴⁵ And LightSquared plans to launch a nationwide wholesale LTE network that will ultimately include 40,000 cell sites that will cover 260 million people by the end of 2015.³⁴⁶

³⁴³ See, e.g., Memorandum Opinion and Order, *Sprint Nextel Corporation and Clearwire Corporation Applications for Consent to Transfer Control of Licenses, Leases and Authorizations*, 23 FCC Rcd 17570, 17956 ¶ 61 (2008) (updating spectrum screen to include AWS-1 and certain BRS spectrum); *AT&T/Dobson Order*, 22 FCC Rcd at 20307-08, 20315 ¶¶ 17, 35 (updating spectrum screen to include 700 MHz spectrum “given its availability and suitability on a nationwide basis for the provision of mobile telephony services”).

³⁴⁴ See Pub. Int. St. at 76-78.

³⁴⁵ Clearwire Corporation, Quarterly Report (1Q 2011 10-Q), at 7 (May 4, 2011).

³⁴⁶ LightSquared, *Nationwide LTE Broadband Network*, <http://www.lightsquared.com/what-we-do/network/>. “LightSquared has not changed its timeframe for launching its 4G LTE (long term evolution) network as a result of ongoing testing concerning interference between its system and GPS (Global Positioning System) receivers[.]” Paul Kirby, *LightSquared Hasn’t Changed Launch Date Due to GPS Interference Testing Process*, TR Daily (June 1, 2011). Deployment of other MSS ATC spectrum is also proceeding apace. DISH is purchasing DBSD, which holds 20 MHz of S-Band MSS ATC spectrum that can be used in the deployment of 4G services, and DISH reports that it “plans to use the satellite and Ancillary Terrestrial Component” (‘ATC’) facets of the MSS spectrum for mobile broadband.” DISH Petition at 1; see also Caroline Humer, *Dish Approved to Buy Satellite Company DBSD*, Reuters (Mar. 15,

As modified to reflect these developments, the spectrum screen simply underscores the lack of any reasonable concern about AT&T's post-merger spectrum holdings.³⁴⁷ The Commission has based those screens on the presumption that holdings of one-third or less of the available spectrum pose no possible threat to competition.³⁴⁸ Here, there will be no market where the combined company will hold one-third or more of the spectrum available for mobile wireless services. Although spectrum holdings must be analyzed on a market-by-market basis, nationwide averages illustrate this point. On average, AT&T holds about 17 MHz of 700 MHz, 21 MHz of cellular, 35 MHz of PCS, and 10 MHz of AWS.³⁴⁹ T-Mobile USA holds about 26 MHz of PCS and 25 MHz of AWS on average. The combined company will therefore hold on average about 134 MHz out of the 653 MHz of spectrum currently available for mobile

2011), <http://www.reuters.com/article/2011/03/15/us-dish-dbsd-idUSTRE72E61N20110315>; Evelyn Rusli, *Dish Network Poised to Land DBSD for \$1 Billion*, N.Y. Times, DealBook (Feb. 1, 2011) <http://dealbook.nytimes.com/2011/02/01/dish-network-set-to-acquire-dbsd-for-1-billion/?scp=1&sq=Dish%20spectrum&st=cse>. Meanwhile, TerreStar's bankruptcy case is moving forward, and the ultimate purchaser will have access to the satellite that TerreStar launched in July 2009 with plans to use its 2 GHz MSS band spectrum to offer integrated satellite and terrestrial voice, data, and video services.

³⁴⁷ On behalf of the Communications Workers of America ("CWA"), Leslie M. Marx, Professor of Economics at Duke University and Former FCC Chief Economist, conducted an analysis that updated the FCC's spectrum screen to reflect recent developments in the wireless industry. Professor Marx concluded that "[w]ith this updated spectrum screen, there are no more than 31 Cellular Market Areas (CMAs) where the combined company's spectrum holdings exceed the screen." CWA Comments, Exh. B, at 1. As CWA notes, in those 31 CMAs, "[t]he large number of potential competitors in each of the CMAs mitigates any concern associated with AT&T's holdings exceeding the spectrum screen." *Id.* at v.

³⁴⁸ *Cingular/AT&T Order*, 19 FCC Rcd at 21568-69 ¶ 109; *Verizon/Alltel Order*, 23 FCC Rcd at 17473 ¶ 54.

³⁴⁹ *Fourteenth Report*, 25 FCC Rcd at 11569, Table 26. Acquisition of the Qualcomm spectrum would add about 7 MHz of 700 MHz spectrum, but that spectrum will not be usable until 2014 at the earliest. *See* Section I.A.1.c, *supra*.

broadband service³⁵⁰—only about a fifth of the total available spectrum. Indeed, even under the outdated spectrum screen that the Commission has used to date (which excludes EBS and MSS ATC), the combined company will hold on average 134 MHz out of 424.5 MHz, which is still less than a third of the total.³⁵¹

The transaction's critics ignore these points in their various spectrum comparisons, which predictably exaggerate AT&T's holdings while grossly understating those of its competitors. For example, many of these comparisons *include* AT&T's WCS holdings even though, as discussed in Section I.A above, WCS is not even currently usable for mobile services.³⁵² At the same time, these comparisons *exclude* spectrum bands in which AT&T's competitors operate but AT&T does not. As noted, Sprint not only tries to dissociate itself from Clearwire's massive spectrum holdings, but also understates Clearwire's holdings by ignoring much of its BRS/EBS spectrum on the ground that it is licensed to other parties (but leased to Clearwire).³⁵³ Similarly, Leap's spectrum charts inappropriately exclude SMR, Lower 700 MHz E, Upper 700 MHz C, BRS/EBS, and MSS ATC, all of which are bands in which AT&T holds little or no spectrum.³⁵⁴ And unlike WCS, *these* spectrum bands, which together total 331 MHz, can be—and in most cases are or will soon be—used for mobile voice and broadband service. Errors like these

³⁵⁰ The 653 MHz consists of 80 MHz of 700 MHz, 50 MHz of cellular, 19 MHz of SMR, 90 MHz of AWS, 130 MHz of PCS, 90 MHz of MSS ATC, and 194 MHz of BRS/EBS.

³⁵¹ WCS spectrum is excluded from this analysis because, as discussed, WCS is not currently usable for mobile broadband services. *See* Section I.A.1.c, *supra*.

³⁵² *See, e.g.*, Free Press Petition at 48; MetroPCS Exhs. A-B.

³⁵³ *See, e.g.*, Sprint Petition at 67-68. Other parties also improperly disregard Clearwire's holdings when addressing Sprint's spectrum position. *See, e.g.*, Free Press Petition at 49; MetroPCS Petition, Exhs. A-B.

³⁵⁴ Leap Petition, Exh. 3.

explain how, for example, Free Press can claim that AT&T has more spectrum than any of its competitors in the top 21 markets (Free Press Petition at 50), whereas in fact Sprint/Clearwire holds by far the most spectrum in all those markets, followed by Verizon in many of them, including New York, Chicago, and Washington.

2. The Opponents’ “Low Band Spectrum” Arguments Are Both Irrelevant and False.

Merger opponents separately argue that, as mobile broadband usage increases, the low band spectrum that Verizon and AT&T hold below 1 GHz will give them undue commercial advantages.³⁵⁵ That argument is irrelevant to this proceeding because, as noted, it is not merger-related. The merger will not meaningfully increase AT&T’s access to low band spectrum because, with the exception of a single 850 MHz license in a single geographic market,³⁵⁶ all of T-Mobile USA’s spectrum is above 1 GHz.

In any event, Sprint and others greatly overstate the asserted advantages of lower-band spectrum over higher-band spectrum, as AT&T’s own strong valuation of T-Mobile USA’s higher band spectrum vividly confirms. It is true that lower-band spectrum has certain *coverage* advantages: because of its superior propagation characteristics, it is technically possible to use lower-band spectrum to provide service over a larger geographic area with a single cell site and to provide better in-building coverage.³⁵⁷ As the Commission has recognized, however, higher-band spectrum above 1 GHz can provide greater *capacity* in the geographic area it covers,³⁵⁸

³⁵⁵ E.g., DISH Petition at 12-14; Free Press Petition at 52.

³⁵⁶ Larsen Decl. ¶ 11 n.2.

³⁵⁷ *Fourteenth Report*, 25 FCC Rcd at 11571-72 ¶ 269.

³⁵⁸ *Id.* at 11573 ¶ 272 (“Conversely, higher-frequency spectrum may be particularly effective for providing significant capacity, or increasing capacity, within a smaller geographic area. In

which can present advantages in urban and suburban areas where demand is greatest. Higher-band spectrum is also available in larger blocks, and there is more of it.³⁵⁹ For all of these reasons, there is no merit to Sprint’s proposal to revise the spectrum screen to weight low band spectrum more heavily.³⁶⁰

It is also meaningless to compare the accounting “book values” of various spectrum bands, as Sprint and its economists purport to do. The true “value” of spectrum depends on a broad variety of factors ignored in those accounting statistics, such as when the spectrum was purchased, what network infrastructure a provider has deployed to make use of it, and how those spectrum and network assets support particular business plans. The implausibility of Sprint’s “book value” analysis becomes obvious when one examines the results of that analysis. For example, AT&T has nearly as much low band spectrum as Verizon and more spectrum overall,³⁶¹ and, by Sprint’s own reckoning, AT&T’s spectrum should therefore be more valuable than Verizon’s. According to Sprint’s book-value “data,” however, Verizon’s spectrum is 40% more valuable than AT&T’s.³⁶²

certain situations, higher frequency bands can achieve greater improvements in capacity. For instance, capacity enhancement technologies such as MIMO may perform better at higher frequencies. . . . Thus higher-frequency spectrum can be ideally suited for providing high capacity where it is needed, such as in high-traffic urban areas.” (footnotes omitted)).

³⁵⁹ *Id.* (“[I]n many parts of these higher bands, spectrum is licensed in larger contiguous blocks, which can enable operators to deploy wider channels and simplify device design.”).

³⁶⁰ Sprint Petition at 76, n.255.

³⁶¹ *Id.* at 60 (stating that AT&T has 48 MHz of low band spectrum and 94 MHz overall; Verizon has 54 MHz of low band spectrum and 88 MHz overall); *id.* at 93 (Verizon has less spectrum than AT&T); Sprint Petition, Stravitz Decl. ¶ 8 (Verizon Wireless has similar broadband-capable spectrum holdings to those of AT&T).

³⁶² Sprint Petition, CRA Decl., Table 6 (valuing Verizon’s spectrum at \$73 billion, AT&T’s at \$52 billion, and Sprint’s at \$20 billion).

Finally, there is no merit to the odd argument by Sprint’s economists that the merger will somehow harm innovation by (1) satisfying AT&T’s needs for spectrum, (2) eliminating AT&T’s incentives to invest in the development of handsets and equipment operable on new spectrum, and thus (3) leaving Sprint and others to incur the entire costs of developing that new spectrum.³⁶³ This argument could make sense only if Sprint had some cognizable right to free-ride on investments made by AT&T, but of course Sprint has no such right. In any event, this merger will not reduce AT&T’s incentives to invest in the development of future spectrum. As AT&T has explained, this transaction is aimed at addressing short-to-intermediate term spectrum exhaust. It will be years before new spectrum is made available, and as long as demand for mobile services continues to expand, AT&T have every incentive to obtain and develop products and services for that spectrum.

F. This Transaction Will Not Harm Competition for Business or Governmental Customers.

Contrary to the claims of a few merger opponents,³⁶⁴ this transaction will not harm competition for business or governmental customers. As an initial matter, in prior wireless transactions, the Commission has consistently analyzed competition for residential and enterprise customers together, finding that this combined approach adequately assesses any potential for competitive harm.³⁶⁵ None of the merger opponents, including Sprint, which has had a number

³⁶³ Sprint Petition, CRA Decl. ¶¶ 106-107.

³⁶⁴ See, e.g., Sprint Petition at 9-10, 16.

³⁶⁵ See *Verizon/RCC Order*, 23 FCC Rcd at 12484 ¶ 38 (“The Applicants concur that the product market definition should include interconnected mobile voice and data services, as well as residential and enterprise services, in a combined market for mobile telephony service. Based on our precedent and the record in this proceeding, we will use the same product market definition in our analysis of the proposed transaction.”) (footnote omitted); *AT&T/Dobson*

of acquisitions reviewed under this combined market approach, offers any convincing reason for the Commission to reverse course here.

In any event, this transaction could not harm competition for business customers because, in the words of T-Mobile USA's Chief Marketing Officer Cole Brodman, the company "has a relatively limited competitive presence in the business segment due to the company's strategic decision to focus on, and invest in, its core consumer business." Brodman Decl. ¶ 5. Indeed, in January 2011, T-Mobile USA estimated its B2B share at only about 4 percent.³⁶⁶

Several leading industry analysts have noted that T-Mobile USA does not strongly compete for business customers:

- "[T-Mobile USA] is nowhere in enterprise."³⁶⁷
- "T-Mobile USA has *never had a strong presence in the enterprise space*, lacking the marketing, professional and managed services, vertical orientation, and even the 'bill on behalf' mobile applications that other carriers offer to large enterprises."³⁶⁸
- "T-Mobile USA continues to confound with its *lack of an SMB strategy*.... T-Mobile USA remains very focused on the consumer market, and—as noted in previous years—has the weakest play in the business space[.]"³⁶⁹

Order, 22 FCC Rcd at 20308 ¶ 21; *Midwest Wireless Order*, 21 FCC Rcd at 11541 ¶ 26; *Sprint/Nextel Order*, 20 FCC Rcd at 13983 ¶ 38; *Western Wireless Order*, 20 FCC Rcd at 13068 ¶ 29; *Cingular/AT&T Wireless Order*, 19 FCC Rcd at 21558 ¶ 74.

³⁶⁶ DT Jan. 20, 2011 Analyst Briefing at 25.

³⁶⁷ Mark Lowenstein, *Lowenstein's View: Sprint+T-Mobile+Clearwire Merger=Short-Term Pain, Long-Term Gain?*, FierceWireless: Europe (Mar. 16, 2011), at 2 (emphasis added), <http://www.fiercewireless.com/story/lowensteins-view-sprintt-mobileclearwire-mergershort-term-pain-long-term-ga/2011-03-16>.

³⁶⁸ Current Analysis, *Implications of AT&T's Acquisition of T-Mobile USA on Consumers/SMBs and Enterprises*, at 1 (Mar. 22, 2011) (emphasis added).

³⁶⁹ IDC Competitive Analysis, *U.S. Mobile Operator 2010 Vendor Analysis: Targeting Savvy and Unsophisticated SMBs Alike*, at 7 (Oct. 2010) (emphasis added).

As Mr. Brodman explains, “T-Mobile USA’s historical decision not to focus on business customers was driven by its strategy to focus limited resources on the consumer segment. As a result, the company has not acquired the resources necessary to deliver some services and functionality that larger buyers in this segment typically desire.” Brodman Decl. ¶ 7. “Similarly, while T-Mobile USA has government/public sector entities among its business segment customers, attracting such customers has not been an area of primary focus. Like large business and enterprise customers, some government/public sector entities have certain solution or support needs that T-Mobile USA is less well equipped to supply than other competitors in this segment.” *Id.* ¶ 11. Not surprisingly, AT&T does not view T-Mobile USA as a close competitor or significant competitive alternative for business or government customers. *See* Peters Decl. ¶¶ 2, 23-24.

Analysts further recognize that T-Mobile USA also lacks the necessary assets to *become* a significant competitor for many types of business and governmental customers within the foreseeable future. First, it has made “lower network investment than competitors” in this space and has dedicated “fewer enterprise support and sales personnel.”³⁷⁰ Second, it “lacks a comprehensive enterprise strategy, with a far smaller organization with which to provide customers with custom solutions,” whereas “other Tier 1 carriers have either re-organized or segmented their marketing and support organizations to better focus on business customers.”³⁷¹ *See also* Peters Decl. ¶¶ 25-29.

³⁷⁰ Gartner, *Magic Quadrant for U.S. Telecommunications Service Providers*, at 14 (Nov. 3, 2010) (“*Gartner Nov. 3, 2010 Report*”).

³⁷¹ Current Analysis, *T-Mobile USA- Business Services US*, at 3 (Dec. 6, 2010) (“*Current Analysis Dec. 6, 2010 Report*”).

Third, T-Mobile USA cannot generally meet the needs of larger business customers for sophisticated solutions and customized mobile applications, ranging from antivirus programs to fleet management tools and sophisticated accounting applications.³⁷² Fourth, T-Mobile USA is a pure play wireless provider, making it more difficult for T-Mobile USA to compete for business customers who require more than basic wireless voice and data plans. *See* Peters Decl. ¶ 28. Fifth, T-Mobile USA's lack of a clear path to LTE means that, over time, it will be increasingly unable to offer the newest high speed services to business customers, who are the most sophisticated and demanding. These shortcomings stand in stark contrast with the range of customized, integrated solutions offered by AT&T Business Solutions, as described by AT&T Business Solutions Chief Marketing Officer Kevin Peters. Peters Decl. ¶¶ 4-19.

Although T-Mobile USA recently expressed an intention to expand its business customer base, it recognizes that this strategy faces significant challenges and requires investment that its parent company has declined to make.³⁷³ As Mr. Brodman explains, "T-Mobile USA faces significant challenges in attracting and/or retaining business and government customers in large part because of the considerable investment that is needed to compete for the enterprise segment

³⁷² *Current Analysis Dec. 6, 2010 Report* at 3; *see also id.* at 2 ("Unlike competitors, T-Mobile has not organized to focus on enterprise accounts or at least offers little customization or vertical specialization."). By contrast, AT&T received the Frost & Sullivan Product Leadership of the Year Award in February 2011, for its portfolio of mobile enterprise applications, including the 2010 formation of AT&T's Advanced Enterprise Mobility Solutions group to focus on delivering mobility products and services to business customers. Press Release, *AT&T Receives Frost & Sullivan Product Leadership of the Year Award for Mobile Enterprise Applications* (Feb. 14, 2011), http://www.corp.att.com/emea/insights/pr/eng/product_leadership_140211.html.

³⁷³ *Jan. 20, 2011 DT Analyst Briefing* at 4 (Deutsche Telekom CEO Rene Obermann); *see also* Langheim Decl. ¶ 14 ("Because Deutsche Telekom's financial priorities must be focused on Europe, however, Deutsche Telekom's CEO Rene Obermann has stated publicly that T-Mobile USA 'has to develop into a self-funding platform that is able to fund its future itself.'").

of the market.” Brodman Decl. ¶ 13. That is why AT&T competes only “infrequently” with T-Mobile USA in this space, and “does not factor in T-Mobile USA” in its strategic planning. Peters Decl. ¶ 24. Rather AT&T increasingly competes with system integrators and mobile business applications providers. Peters Decl. ¶¶ 20-22.

The transaction also could not harm the small-business customers that do not demand such differentiated services and that generally purchase on a transactional basis from retail outlets. Such customers can generally choose among the same broad range of wireless providers as consumers generally, and T-Mobile USA thus faces competition from many sources. As Mr. Brodman explains, “[c]ompetitive dynamics in these segments are similar to the consumer segment, and include competitive offers from MetroPCS, Leap, US. Cellular and Cellular South.” Brodman Decl. ¶ 8. In addition to AT&T, Verizon Wireless, and Sprint, all of the following market services to small-business customers:

- U.S. Cellular offers “National Business Plans” that it describes as “powerful yet flexible” for customers who need 2 lines or 50.³⁷⁴ It identifies applications targeting wireless business services such as BillTrackerSM, a service that consolidates all employees’ wireless expenses on an easy-to-use Web-based server; and etrace, which lets a business view the location information of each active phone via an online interface, keep track of time cards and transaction information, and benefit from turn-by-turn directions.
- Cellular South also offers advanced business enterprise services, including the Telogis Fleet Management system that is GPS based and designed to maximize efficiency and track all critical vehicle information and an etrace data solution similar to U.S. Cellular’s.³⁷⁵

³⁷⁴ U.S. Cellular Business Voice Plans,
<http://www.uscellular.com/business/plans/voice.html>.

³⁷⁵ Cellular South,
<https://www.cellularsouth.com/cscommerce/business/page.jsp?id=/generic/Business/Telogis>.

- MetroPCS launched ChatLINK, a push-to-talk feature that allows MetroPCS subscribers to create a network of up to 10 individuals and connect with them in walkie-talkie like discussions at the press of a button.³⁷⁶
- Leap recently launched Cricket Multi-Value Plan™, which allows customers to add up to three additional lines to their account and receive a discount of \$10 per month for each line, while consolidating billing for all of those lines onto a single statement, making it “easier for households and *small business* to manage their wireless account.”³⁷⁷

Given these multiple sources of competition, this transaction could not harm any aspect of the business marketplace even if it were analyzed separately from the wireless market in general.

A few opponents contend that, because the two companies use the same GSM technologies, T-Mobile USA is AT&T’s closest competitor for business customers whose employees travel internationally.³⁷⁸ That is incorrect. First, large enterprises with an internationally mobile employee base are obvious examples of companies that require more sophisticated services than what T-Mobile USA offers, and they therefore do not generally view T-Mobile USA as a strong competitive alternative to AT&T. Second, in any event, international business travelers no longer need to purchase service from GSM-based providers in the U.S. in order to have handsets that function overseas. Mr. Brodman observes:

While GSM networks initially had an advantage in being able to serve international business travelers with roaming needs, for the last several years advances in mobile devices have effectively blunted what was once an advantage for GSM carriers. T-Mobile’s CDMA competitors offer international roaming services, and dual mode phones with CDMA/GSM chipsets are available in the marketplace and have been for several years. . . . Business customers are more

³⁷⁶ Press Release, *MetroPCS Introduces ChatLINK™* (Apr. 17, 2008), <http://www.metropcs.com/presscenter/articles/mpcs-news-20080417.aspx>

³⁷⁷ Press Release, *Leap Announces the Launch of Cricket Unlimited(TM) - The First-Ever Complete Package of Unlimited Anytime Local, U.S. Long Distance and Text Messaging Wireless Services* (Mar. 16, 2004), <http://phx.corporate-ir.net/phoenix.zhtml?c=191722&p=irol-newsArticle&ID=721772&highlight=small business> (emphasis added).

³⁷⁸ E.g., Sprint Petition, Dupree Decl. ¶ 17.

focused on capabilities than network technology, and they can readily get international roaming capability with a CDMA carrier as their home carrier.

Brodman Decl. ¶ 10; *see also* Peters Decl. ¶ 32.³⁷⁹ In short, GSM technology does not alone drive business customer decisions today, and, as Mr. Brodman observes, “[t]he transition to LTE will eventually eliminate any remaining distinction based on the GSM-air interfaces as advantageous for international roaming.” *See* Brodman Decl. ¶ 10.

Precisely because T-Mobile USA is not a substantial competitive alternative for business customers, both small and large businesses have submitted statements of support for this transaction. Business customers welcome the benefits this transaction will bring to them. Cameron International, for example, notes that it looks forward to “benefitting from improved service quality and expanded 4G LTE coverage that may result from the acquisition.”³⁸⁰ Emerson Electric highlights that “this transaction will increase capacity and help support next generation devices.”³⁸¹ Medical equipment manufacturer Welch Allyn affirms that “[t]he merger will make possible the investment in the next generation of technology which will result in better service and value for the customer.”³⁸² Global IT service provider L&T Infotech highlights that

³⁷⁹ *See, e.g.,* Sprint, *International Wireless Service*, <http://shop2.sprint.com/en/services/worldwide/worldwide.shtml>; Verizon, *Global Phone*, http://b2b.vzw.com/international/Global_Phone/index.html.

³⁸⁰ *See* Statement of Robert G. Block, IT Manager, Cameron International (undated).

³⁸¹ *See* Letter from Emerson (May 17, 2011). (AT&T’s CEO is on the board of Emerson, but he took no part in the company’s decision to send this letter).

³⁸² Statement of Eric Hunt, Chief Information Officer of Welch Allyn (May, 26 2011); *see also* Letter from Nancy Ploeger, President, Manhattan (NY) Chamber of Commerce (May 31, 2011) (supporting merger and enhancement of mobile broadband coverage, citing benefits to New York business community of over 100,000 companies); Statement of Silicon Valley Leadership Group (May 27, 2011) (“merger is a logical, viable solution to the looming spectrum shortages” and expansion of 4G LTE wireless service will offer “tremendous growth potential” for Silicon Valley companies and be significant for telehealth industry); Statement of Missouri

“the proposed transaction will result in fewer dropped calls and more overall reliability and better coverage, which translates to more connectivity for my firm’s critical business users.”³⁸³

And utility contractor Asplundh notes that the transaction “would result in better quality service such as fewer dropped calls and faster service.”³⁸⁴

Finally, there is no merit to the concerns of Alarm.com that this transaction will harm the specialized class of business customers—such as alarm companies, fleet-management providers, and e-reader providers—that use the applicants’ wireless services for machine-to-machine (“M2M”) connectivity. First, as with business services generally, “T-Mobile USA has a very limited presence in M2M services,” generating only about **[Begin Confidential Information]**

[End Confidential Information] in revenue last year. Brodman Decl. ¶ 12.

Second, there is no separate market for GSM-based M2M services that this transaction could harm. *See generally* Peters Decl. ¶¶ 32-35. A broad variety of facilities-based wireless providers and MVNOs compete to serve M2M customers,³⁸⁵ and such customers can and do

Chamber of Commerce and Industry (May 18, 2011) (urging approval of merger to support expansion of wireless broadband connectivity, “a critical component to ensure all Missouri businesses – large and small – are able to compete locally and globally”); Statement of New Jersey Chamber of Commerce (May 25, 2011) (“It is important to the New Jersey Chamber of Commerce and thousands of businesses across the state that AT&T’s 4G LTE service is upgraded and expanded, as the merger stands to do”); Statement of San Francisco Chamber of Commerce (May 23, 2011) (citing benefits of “improving business performance” through expansion of 4G LTE service).

³⁸³ See Statement of Puneet Singal, Manager of Finance Accounts and Administration at L&T Infotech (June 4, 2011).

³⁸⁴ Statement of George Gunther, Asplundh CIO (June 8, 2011).

³⁸⁵ For example, in October 2009, Sprint created an “Emerging Business Solutions Group,” with dedicated M2M employees, Press Release, *Sprint Announces New Emerging Solutions Unit to Bolster M2M and Mobile Computing Portfolio, Accelerate Delivery to Marketplace* (Oct. 6, 2009), and it now offers over 300 certified devices. *See* Sprint, *Machine-to-Machine (M2M) Wireless Solutions to Power Your Ideas*, <http://developer.sprint.com/site/global/home/m2m/>

switch between wireless technologies. For example, Amazon.com used CDMA-based Sprint for the first Kindle and switched to GSM-based AT&T for the Kindle 2.³⁸⁶ Similarly, **[Begin**

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Confidential Information] deployed devices using, respectively, analog and GSM technologies before migrating to CDMA devices. *See* Peters Decl. ¶ 34. Moreover, some M2M customers—such as SmartSynch, a SmartGrid manufacturer—operate seamlessly on both GSM and CDMA technologies so that they can deploy either based on coverage in particular areas or customer preference.³⁸⁷ This seamless GSM/CDMA experience will only increase with Qualcomm’s Gobi 3000 Modules, which offer dual CDMA/GSM network access and a roadmap for enabling

embeddedm2moverview.jsp. And Verizon, which provides the connectivity for GM’s OnStar devices in vehicles, has formed the nPhase joint venture with Qualcomm and partnered with Vodafone to expand its offerings in the United States and globally. Press Release, *Vodafone, Verizon Wireless and nPhase Announce Strategic Alliance to Provide Global M2M Solutions* (Feb. 15, 2010), http://enterprise.vodafone.com/insight_news/2010-02-15_vodafone_verizon-wireless_nphase_announce_strategic_m2m_alliance.jsp?icmp=news_m2m_alliance. MVNOs such as Numerex, Kore Telematics, Wylless, M2M DataSmart, and Aeris Communications also aggressively compete for M2M business. For example, Kore Telematics describes itself as a “multi-market MVNO ... [that] provides all the functions you expect of a Tier 1 mobile operator, only more effectively.” Kore Telematics, Airtime Services, <http://www.koretelematics.com/en/products-services/airtime-services/index.html>.

³⁸⁶ *See* Press Release, *Amazon Lowers Price on #1 Bestseller Kindle to \$259 and Introduces New Addition to the Kindle Family of Wireless Reading Devices-Kindle with U.S. & International Wireless* (Oct. 7, 2009), <http://phx.corporate-ir.net/phoenix.zhtml?c=176060&p=irol-newsArticle&ID=%201339431&highlight=>; David Carnoy, *Amazon stops selling Sprint-powered Kindle*, CNET News (Oct. 22, 2009), http://news.cnet.com/8301-17938_105-10381325-1.html. As this example illustrates, M2M customers generally do not retrofit their installed devices, as that is too costly even within the same technology. Competition is therefore generally for future versions of the devices, and that is plainly broader than GSM. *See* Peters Decl. ¶ 34.

³⁸⁷ *See* SmartSynch » Why Cellular? » Network Options, <http://www.smartsynch.com/whycellular/networks.php>.

devices to work with multiple access technologies and carriers.³⁸⁸ And the GSM/CDMA distinction will become even less relevant as the industry transitions to LTE.³⁸⁹

G. The Transaction Presents No “Net Neutrality” Concerns.

Some merger opponents, such as Public Knowledge, are also some of the most vociferous critics of the Commission’s *Net Neutrality Order*.³⁹⁰ In that order, the Commission concluded that because the wireless broadband ecosystem differs in fundamental respects from the wireline ecosystem, regulators should not hamstring wireless broadband providers with intrusive “nondiscrimination” rules.³⁹¹ Critics of the *Net Neutrality Order* evidently view this proceeding as a second bite at the apple on all of the wireless issues that the Commission has already decided against them. But their arguments for reversing the Commission’s decision are unavailing because they are neither merger-specific nor substantively plausible.

After more than a year of intense deliberation, the Commission decided to impose more flexible “neutrality” rules on mobile broadband services than on their fixed-line counterparts.

The Commission noted that mobile providers face far greater capacity constraints than fixed-line

³⁸⁸ Qualcomm announced the availability of the Gobi 3000 module, which offers a multi-mode CDMA/UMTS design, in February 2011. See Press Release, *Qualcomm Announces Commercial Availability of Gobi 3000 Modules* (Feb. 14, 2011), <http://www.qualcomm.com/news/releases/2011/02/14/qualcomm-announces-commercial-availability-gobi3000-modules>.

³⁸⁹ To the extent Alarm.com alleges that T-Mobile USA has made some enforceable commitment to continue operating a GSM network, any commercial dispute about AT&T’s obligations as T-Mobile USA’s successor is of course properly resolved in some other forum, not this merger proceeding. See n.471, *infra* (describing established Commission precedent to decline adjudication of private contractual disputes about matters not germane to the agency’s authority).

³⁹⁰ Report and Order, *Preserving the Open Internet, Broadband Industry Practices*, 25 FCC Rcd 17905 (2010) (“*Net Neutrality Order*”).

³⁹¹ *Id.* at 17956-58 ¶¶ 93-96.

providers,³⁹² that “[m]obile broadband is at an earlier stage in its development than fixed broadband and is evolving rapidly,”³⁹³ and that “most consumers have more choices for mobile broadband than for fixed (particularly fixed wireline) broadband.”³⁹⁴ All of those considerations will remain as valid and critical after this transaction as before, and they independently justify continued application of more flexible net neutrality rules to the combined company.

Merger opponents nonetheless claim that AT&T could somehow harm competition in the adjacent markets for Internet applications and content unless the Commission imposes prescriptive “nondiscrimination” rules on the combined company.³⁹⁵ Although the Commission adopted such a condition as part of the Comcast-NBC Universal transaction last year, that condition was designed to address allegations of harm specific to that merger.³⁹⁶ In particular, the Commission concluded that, because the transaction would combine a major broadband company with a major content company, it would give the merged company “incentive to discriminate against unaffiliated content and distributors.”³⁹⁷ Here, by contrast, the transaction

³⁹² *Id.* at 17957 ¶ 95.

³⁹³ *Id.* at 17908 ¶ 8.

³⁹⁴ *Id.* at 17957 ¶ 95.

³⁹⁵ *See, e.g.*, Public Knowledge Petition at 41-44; Consumer Electronics Retailers Coalition Comments at 5, 26-27, 35; New Media Rights Petition at 4-10; Electronic Frontier Foundation Letter at 2-3; New Jersey Rate Counsel Petition at 45-48.

³⁹⁶ Memorandum Opinion and Order, *Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees*, 26 FCC Rcd 4238, 4274-76 ¶¶ 91-95 (2011) (“*Comcast/NBCU Order*”).

³⁹⁷ *Id.* at 4275 ¶ 93 (“[W]e find that Comcast’s acquisition of additional programming content that may be delivered via the Internet, or for which other providers’ Internet-delivered content may be a substitute, will increase Comcast’s incentive to discriminate against unaffiliated content and distributors in its exercise of control over consumers’ broadband connections.”).

poses no conceivable threat to online applications or content because neither AT&T nor T-Mobile USA is a major provider of applications or content. *See* Christopher Decl. ¶ 41; *see also* Willig Decl. ¶¶ 45-47. Instead, they are both wireless platform providers, and their combination will create a wireless provider only about one-third larger than the current AT&T.

Merger opponents articulate no coherent reason to conclude that this increase in size will somehow enhance AT&T's incentive or ability to act anticompetitively towards providers of complementary applications or content at all, much less to such an extent that the Commission should single out the combined company for uniquely invasive mandates. First, the combined company will have no *incentive* to harm open competition in the provision of complementary applications. *See* Christopher Reply Decl. ¶ 41. As AT&T explained in detail in the net neutrality proceeding, ensuring that customers have access to the content and applications of their choice makes its wireless platform more valuable to users.³⁹⁸ Accordingly, AT&T competes vigorously with other providers to offer the widest possible array of applications on its network,³⁹⁹ and it actively facilitates the creation of new applications through its AT&T

³⁹⁸ *See, e.g.,* Reply Comments of AT&T, Inc., *Preserving the Open Internet, Broadband Industry Practices*, GN Docket No. 09-191, WC Docket No. 07-52, at 72 (filed Apr. 26, 2010) (“AT&T Net Neutrality Reply Comments”) (“Providers that have invested billions in their networks and that have attracted customers on the strength of their broadband offerings have every incentive to continue offering consumers an attractive, robust mix of services, and to keep their platforms as attractive and user-friendly as possible to the widest range of ... application and content providers.”); Comments of AT&T, Inc., *Preserving the Open Internet, Broadband Industry Practices*, GN Docket No. 09-191, WC Docket No. 07-52, at 55 (filed Oct. 12, 2010) (“AT&T Net Neutrality Further Inquiry Comments”) (“[W]ireless providers know that they can win customers only by offering a robust mix of applications—and that if they reject, limit, or compromise useful applications, they will undermine the value of their service”).

³⁹⁹ Some commenters cite supposed instances of past discriminatory conduct by AT&T. *See, e.g.,* Consumer Electronics Retailers Coalition Comments at 26-27 (discussing VoIP applications); New Media Rights Petition at 5-6 (discussing VoIP and video applications); Dish Network Petition at 10 (discussing video application); Consumers Union Petition at 26 (same).

Developer Program, which offers extensive information, tools, and online assistance to enable the design of applications that work efficiently across a range of devices, operating systems, and platforms.⁴⁰⁰ Further, AT&T also offers its customers direct access to a wide variety of application stores, including the Android Market, the Apple App Store, the Blackberry App World, and the Windows Marketplace, as well as numerous independent app stores on the Internet, such as Handango, PocketGear, GetJar, Handmark, and MobiHand. *See* Christopher Reply Decl. ¶ 40.

Nothing about this transaction will undermine AT&T's incentives to continue providing customers access to the content and applications of their choice. The combined company could not find it profitable to harm such complementary content and applications unless, at a minimum, it were somehow earning supracompetitive profits it wished to “protect” in the applications and content marketplace.⁴⁰¹ Again, that concern cannot arise here because the applicants are not major, let alone dominant, providers in that marketplace to begin with.

Second, the transaction could not plausibly give the post-merger AT&T any new *ability* to harm competition in the global marketplace for complementary applications or content. As

AT&T has refuted these assertions in its net neutrality advocacy, which it incorporates by reference here. *See, e.g., AT&T Net Neutrality Reply Comments* at 25-26, 72-75; *Comments of AT&T, Inc., Preserving the Open Internet, Broadband Industry Practices*, GN Docket No. 09-191, WC Docket No. 07-52, at 155-56 (filed Jan. 14, 2010) (“*AT&T Net Neutrality Comments*”); *AT&T Net Neutrality Further Inquiry Comments* at 55-56.

⁴⁰⁰ *See* Christopher Reply Decl. ¶ 42. *See also AT&T Net Neutrality Further Inquiry Comments* at 53-54.

⁴⁰¹ Joseph Farrell & Philip J. Weiser, *Modularity, Vertical Integration, and Open Access Policies: Towards a Convergence of Antitrust and Regulation in the Internet Age*, 17 Harv. J.L. & Tech. 85, 100-19 (2003) (explaining the general rule that even “a platform monopolist has an incentive to innovate and push for improvements in its system—including better applications—in order to profit from a more valuable platform”).

discussed, competition among wireless service providers will remain strong after this merger. If the combined company were to impair the ability of third parties to provide complementary applications and content over its network, it would simply drive consumers into the hands of wireless competitors that do *not* degrade their platforms that way. As Mr. Christopher explains in his declaration, “[g]iven the enormous consumer demand for mobile applications, driving away app developers and their applications from AT&T’s network would only serve to dissatisfy our customers and encourage them to switch providers.” Christopher Reply Decl. ¶ 41. In short, there is no reason to believe that, had this transaction been completed before the *Net Neutrality Order* was adopted, the Commission’s flexible approach to wireless broadband Internet access would have been any different.⁴⁰²

⁴⁰² For similar reasons, Public Knowledge is wrong to assert that this transaction will enable the combined company to discriminate anticompetitively with respect to short codes. *See* Public Knowledge Petition at 30-31. Instead, shortcodes will continue to work as they do today: third-party marketers will continue to obtain them from the Common Short Code Administrator (CTIA); customers will continue to expect AT&T to enable the use of those short codes on its network; and they will vote with their feet by switching to another provider if AT&T arbitrarily curtails the use of this feature. Further, requiring AT&T to abide by any “nondiscrimination” requirement with respect to short codes would be affirmatively harmful because it would undermine efforts to protect consumers from fraudulent marketing campaigns, child pornography, advertisements for illegal drugs, and other harmful short code practices. *See* Comments of Verizon and Verizon Wireless, *Consumer Information and Disclosure, Truth-in-Billing and Billing Format, IP-Enabled Services*, CG Docket No. 09-158, CC Docket No. 98-170, WC Docket No. 04-36, at 42-44 (filed Oct. 13, 2009) (describing consumer-protection measures with respect to short-code campaigns); Mobile Marketing Assoc., *U.S. Consumer Best Practices* (Mar. 1, 2011), <http://www.mmaglobal.com/bestpractices.pdf> (detailing industry best practices to ensure “consumer protection and privacy” in short-code programs). In any event, the proper regulatory treatment of shortcodes is already at issue in an ongoing industry-wide proceeding, and the Commission should address it there. *See* Public Knowledge Petition, *Petition for Declaratory Ruling Stating That Text Messaging and Short Codes Are Title II Services or Are Title I Services Subject to Section 202 Nondiscrimination Rules*, WT Docket No. 08-7 (filed Dec. 11, 2007).

Finally, some merger opponents urge the Commission to condition this transaction on “any device” and “any application” obligations similar to those it imposed on the C-Block spectrum in the 700 MHz auction.⁴⁰³ Such conditions would be improper and unlawful.

When the Commission imposed the “open platform” model on the C Block, it recognized that this model “may have unanticipated drawbacks.”⁴⁰⁴ Accordingly, it “impose[d] the open platform requirement only on a limited basis” to “allow both the Commission and industry to observe the real-world effects of such a requirement.” *Id.* In other words, the Commission specifically recognized that the C-Block mandates might well do more harm than good, and it therefore concluded that the only responsible course of action was to study their effects in a real-world experiment before imposing similar rules on any other spectrum. Because Verizon Wireless is only now starting to provide service over the C Block, that controlled regulatory experiment has only just begun, and it would make no sense to saddle AT&T or any other provider with similar obligations.⁴⁰⁵ Again, the Commission reached essentially the same

⁴⁰³ See, e.g., New Media Rights Petition at 8 (urging the Commission to “plac[e] open access restrictions similar to that placed on C-block spectrum”); Cablevision Comments at 16-18 (arguing that the Commission “should require AT&T to adhere to the open platform requirements analogous to those currently applied to the C Block—which generally prohibit the licensee from restricting the ability of its customers to use the devices and applications of their choice on the licensee’s network”); Consumer Electronics Retailers Coalition Comments at 5, 35 (arguing that the merged company should be required to attach third-party devices to its network).

⁴⁰⁴ Second Report and Order, *Service Rules for the 698-746, 747-762, and 777-792 MHz Bands*, 22 FCC Rcd 15289, 15364-65 ¶ 205 (2007).

⁴⁰⁵ Any such reversal would also be unlawful because it would defeat AT&T’s investment-backed expectations with respect to *other* spectrum that it won in the 700 MHz auction. See *AT&T Net Neutrality Comments* at 233-35. AT&T, like other participants in that auction, relied on the Commission’s assurance that the C Block was the sole subject of the “open platform” experiment. The result was a stark disparity in the relatively low per-POP bids for C-Block spectrum and the much higher bids for other 700 MHz spectrum that was *not* equally

conclusion when it rejected similar industry-wide requirements in the *Net Neutrality Order*, and opponents of this transaction identify no reason for the Commission to reverse course now.⁴⁰⁶

III. THE COMMISSION SHOULD REJECT UNNECESSARY MERGER CONDITIONS.

A. The Commission Should Reject Proposed Restrictions on Divestitures.

As discussed above and in the Public Interest Statement, this transaction is procompetitive and will provide substantial benefits to consumers. To the extent there are any local areas where the Commission believes the merger creates a potential for anticompetitive effects, it should address those concerns by conditioning approval on local divestitures of spectrum or business units, consistent with Commission precedent in wireless transactions of this type. Because the Commission has (correctly) defined the geographic market as local, the purchasers of those divested assets obviously may vary from locality to locality.⁴⁰⁷ The

encumbered. Indeed, at the time, AT&T made clear that it paid billions of dollars more for its 700 MHz B-Block spectrum specifically *because* that spectrum was unencumbered. The Commission may not now change the rules of the game and impose open access rules that would massively devalue this spectrum. *See id.* at 233-35.

⁴⁰⁶ AT&T *already* offers customers more than a hundred wireless handset options, over which consumers can run every major operating system; and, like most major providers, it enables consumers to purchase compatible handsets of their choice from third-party vendors and use them on AT&T's network with an AT&T wireless service plan. *See AT&T Net Neutrality Further Inquiry Comments* at 42-47; *AT&T Choice*, <http://choice.att.com/flash/customersdevices.aspx>.

⁴⁰⁷ The Commission often has approved divestiture sales to regional or local competitors. Recent examples include the acquisition of former Dobson Communications Corp. assets in Oklahoma, Texas, and Kentucky by MTPCS and its affiliates; the acquisition of former Centennial assets in Louisiana by MTPCS and its affiliates; and the acquisition of former Alltel assets in portions of six states by Atlantic Tele-Network Inc. *See generally* Memorandum Opinion and Order, *Applications of Atlantic Tele-Network, Inc. and Cellco Partnership d/b/a Verizon Wireless for Consent to Assign or Transfer Control of Licenses and Authorizations*, 25 FCC Rcd 3763 (WTB, IB 2010); ULS File No. 0003411114 (Call Sign: KNKR336), Apr. 26, 2008 (assignment of former Dobson licenses in CMA661—Texas 10, Navarro—to MTPCS affiliate); ULS File No. 0003411127 (Call Sign: WQGA841), Apr. 26, 2008 (assignment of

Commission could also address any concerns about efficiency in this process by encouraging the combined company to group any divested assets into appropriate packages, such as all divested assets within a particular state.⁴⁰⁸

A couple of commenters urge the Commission to impose conditions on the combined company's divestiture of assets. They argue that AT&T should be barred from divesting spectrum to Verizon or Sprint, but also should be required to divest spectrum to existing providers rather than new entrants—and one commenter self-interestedly argues that AT&T should be required to divest spectrum to it specifically.⁴⁰⁹ The Commission should reject such proposals and follow its sound practice of allowing market forces to determine which acquirers are best positioned to ensure competition in a market, rather than prejudging the matter and tilting the playing field in favor of or against particular firms. In the Verizon/Alltel proceeding, for example, several commenters asked the Commission to dictate “how and to whom” spectrum would be divested, but the Commission properly rejected that request.⁴¹⁰ In ordering Verizon to

former Dobson licenses in CMA600—Oklahoma 5, Rogers Mills—to MTPCS affiliate); ULS File Nos. 0004139682, 0004139683 (Call Signs: KNKA813, WMT282), Aug. 25-26, 2010 (assignment of former Centennial licenses in Louisiana to MTPCS affiliate).

⁴⁰⁸ There is precedent for such an approach in the Verizon/Alltel transaction. *See* Modified Final Judgment, *United States v. Verizon Commc'ns Inc.*, No.: 1:08-cv-01878 (EGS), at 12-17 (D.D.C. Apr. 8, 2011), *available at* <http://www.justice.gov/atr/cases/f269600/269637.htm>.

⁴⁰⁹ *See, e.g.*, MetroPCS Petition at 67-75; Cincinnati Bell Petition at 26-29. MetroPCS further contends that AT&T should “be required to divest the spectrum ... so that any closing on the divestiture would occur contemporaneous with the consummation of the merger with T-Mobile.” MetroPCS Petition at 73-75. Contrary to MetroPCS's suggestion (at 75), AT&T cannot “already ... undertak[e] the process of identifying potential purchasers and starting negotiations with them,” because, among other considerations, it is unclear where divestitures may be required. The proposed condition would be entirely unprecedented, and for good reason: it would significantly delay the closing of the merger and deny consumers its benefits for a prolonged period.

⁴¹⁰ *Verizon/Alltel Order*, 23 FCC Rcd at 17517 ¶ 160.

divest five markets, the Commission declined to “place any conditions on the sale of the Divestiture Assets based on (1) the size, ownership structure, or business plan of the acquirer, or (2) the size of the geographic areas that the Divestiture Areas can be sold to an acquirer.”⁴¹¹ Similarly, in all of its previous wireless merger decisions, the Commission ordered divestitures in relevant local markets without dictating how or to whom the divestitures should be made.⁴¹²

The purpose of a divestiture is to ensure that any competition lost as a result of a merger is restored. Using market mechanisms to select a purchaser creates built-in incentives for the acquirer to compete vigorously. Moreover, as the Commission noted in the *Verizon/Alltel Order*, “the qualifications of the entity(ies) acquiring the Divestiture Assets and whether the specific transaction is in the public interest will be evaluated when an application is filed seeking the Commission’s consent to the transfer or assignment of the Divestiture Assets.”⁴¹³ This practice is consistent with the statutory direction that the Commission evaluate whether a license transfer serves the public interest without regard to whether a different buyer might be preferable.⁴¹⁴

⁴¹¹ *Id.* at 17518 ¶ 162. The Commission should ensure, however, that a wide range of potential bidders are educated about divestiture opportunities, while allowing market forces to determine which bidders are best positioned make efficient use of the divested assets.

⁴¹² See, e.g., Memorandum Opinion and Order, *Applications of AT&T Inc. and Dobson Communications Corp. for Consent to Transfer Control of Licenses and Authorizations*, 22 FCC Rcd 20295, 20336 ¶ 88 (2007) (“*AT&T/Dobson Order*”); Memorandum Opinion and Order and Declaratory Ruling, *Applications of Cellco Partnership d/b/a Verizon Wireless and Rural Cellular Corporation for Consent to Transfer Control of Licenses, Authorizations, and Spectrum Manager Leases*, 23 FCC Rcd 12463, 12512-13 ¶ 113 (2008) (“*Verizon/RCC Order*”); Memorandum Opinion and Order, *Applications of Western Wireless Corp. and Alltel Corp. for Consent to Transfer Control of Licenses and Authorizations*, 20 FCC Rcd 13053, 13112 ¶ 162 (2005); *Cingular/AT&T Wireless Order*, 19 FCC Rcd at 21620 ¶ 254.

⁴¹³ *Verizon/Alltel Order*, 23 FCC Rcd at 17518 ¶ 162.

⁴¹⁴ 47 U.S.C. § 310(d) (“[I]n acting thereon the Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee.”).

B. The Commission Should Reject the Grab-Bag of Conditions That Merger Opponents Have Proposed.

In addition to divestiture-related restrictions, merger opponents propose a laundry list of other conditions. These parties share one objective: using this merger proceeding to gain regulatory advantages that they have been unable to obtain on an industry-wide basis. But it is well established that “merger review is limited to consideration of merger-specific effects.”⁴¹⁵ The Commission “will not impose conditions to remedy *pre-existing* harms or harms that are unrelated to the transaction.”⁴¹⁶ Nor will it “single Applicants out for special treatment

⁴¹⁵ Order, *Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee*, 17 FCC Rcd 22633, 22637 ¶ 11 (2002). See also Memorandum Opinion and Order, *Joint Applications of Global Crossing Ltd. And Citizens Communications Co. for Authority to Transfer Control of Corporations Holding Commission Licenses and Authorizations Pursuant to Sections 214 and 310(D) of the Communications Act and Parts 20, 22, 63, 78, 90, and 101 of the Commission’s Rules*, 16 FCC Rcd 8507, 8511 ¶ 10 (CCB, IB, CSB, WTB 2001) (rejecting suggested conditions because commenters “failed to show that the harms they allege are sufficiently merger-specific or come within the scope of harms [the Commission] consider[s] in dealing with license transfer applications”).

⁴¹⁶ *Verizon/Alltel Order*, 23 FCC Rcd at 17463 ¶ 29. See also *id.* at 17529, 17535 ¶¶ 188, 207; Memorandum Opinion and Order, *Verizon Communications Inc. and MCI, Inc., Applications for Approval of Transfer of Control*, 20 FCC Rcd 18433, 18446 ¶ 19 (2005) (to be a proper subject of consideration on review of a transaction, an alleged harm must directly “arise from the transaction”) (“*Verizon/MCI Order*”); Memorandum Opinion and Order and Declaratory Ruling, *IT&E Overseas, Inc., Transferor, and PTI Pacifica Inc., Transferee*, 24 FCC Rcd 5466, 5474 ¶ 14 (WCB, WTB, IB 2009); Memorandum Opinion and Order, *Applications for Consent to the Assignment and/or Transfer of Control of Licenses; Time Warner Inc. and Its Subsidiaries, Assignor/Transferor to Time Warner Cable Inc., and Its Subsidiaries, Assignee/Transferee*, 24 FCC Rcd 879, 887 ¶ 13 (MB, WCB, WTB, IB 2009) (“*Time Warner Order*”); Memorandum Opinion and Order, *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, 20 FCC Rcd 18290, 18303 ¶ 20 (2005) (“*SBC/AT&T Order*”).

unwarranted by any likely adverse consequences of the transaction.”⁴¹⁷ In short, merger reviews are not the proper forum for resolution of industry-wide policy issues.⁴¹⁸ That is particularly true of “matters that are the subject of other proceedings before the Commission because the public interest would be better served by addressing the matter in the broader proceeding of general applicability.”⁴¹⁹ As the Commission has recognized, adopting non-transaction-specific conditions “could distort competitive market conditions, resulting in favoring some providers

⁴¹⁷ Memorandum Opinion and Order, *General Motors Corporation and Hughes Electronics Corporation, Transferors and The News Corporation Limited, Transferee, for Authority to Transfer Control*, 19 FCC Rcd 473, 534 ¶ 131 (2004) (“GM/Hughes Order”).

⁴¹⁸ See *GM/Hughes Order*, 19 FCC Rcd at 534 ¶ 131 (“An application for a transfer of control of Commission licenses is not an opportunity to correct any and all perceived imbalances in the industry. Those issues are best left to broader industry-wide proceedings.”); Memorandum Opinion and Order, *Applications of Craig O. McCaw and Am. Tel. & Tel. Co. for Consent to the Transfer of Control of McCaw Cellular Commc’ns, Inc. and Its Subsidiaries*, 9 FCC Rcd 5836, 5904 ¶ 123 (1994) (“McCaw/AT&T Order”) (the Commission’s policy is to “not consider arguments in [transaction] proceeding[s] that are better addressed in other Commission proceedings”).

⁴¹⁹ Memorandum Opinion and Order, *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Southern New England Telecommunications Corporation to SBC Communications, Inc.*, 13 FCC Rcd 21292, 21306 ¶ 29 (1998); Memorandum Opinion and Order, *Application of GTE Corporation and Bell Atlantic Corporation for Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, 15 FCC Rcd 14032, 14229 ¶ 432 (2000); Memorandum Opinion and Order, *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee*, 16 FCC Rcd 6547, 6633 ¶ 209 (2001) (“[T]he issues raised by [opponents] are already under consideration in pending Commission proceedings of general applicability. The conditional requirements suggested by [opponents] should be addressed in those proceedings, and not within the confines of the merger analysis.”); *AT&T/Cingular Order*, 19 FCC Rcd at 21592 ¶ 183 (refusing to address issue that was the subject of existing rulemaking proceedings and noting that the Commission instead should “develop a comprehensive approach based on a full record that applies to all incumbent LECs so that the Commission treats similarly-situated incumbent LECs in the same manner”).

over others unjustly and unreasonably.”⁴²⁰ That would be the precise result of adopting many of the conditions that merger opponents propose here. Although we discuss a handful of these proposals below, the short answer in nearly all cases is that the proposed conditions would not address any merger-specific effect and must therefore be rejected under the Commission’s longstanding precedent.⁴²¹ And in all events, these proposed conditions are substantively baseless.

1. Mandatory Resale Obligation.

Some merger opponents argue that the transaction will harm competition in the wireless wholesale marketplace and advocate a condition requiring the merged company to offer services for resale.⁴²² The Commission should reject such proposals. The Commission decided long ago to sunset its resale rule,⁴²³ and the basis for that decision remains sound. The wireless wholesale

⁴²⁰ Memorandum Opinion and Order, *Applications of AT&T Inc. & Cellco P’ship d/b/a Verizon Wireless for Consent to Assign or Transfer Control of Licenses and Authorizations and Modify a Spectrum Leasing Arrangement*, 25 FCC Rcd 8704, 8747 ¶ 99 (2010) (“AT&T/Verizon Order”).

⁴²¹ See, e.g., Zip DX Petition at 9-14 (AT&T should be required to provide “HDVoice”); Granite Telecommunications Comments at 3-9 (Commission should impose numerous price and other conditions on AT&T’s wholesale offering of DSL service, including requiring DSL “line splits”); Access Point Comments at 4-8 (same); Logix Petition at 6-9 (AT&T’s wireless affiliates should not be permitted to provide any offerings to its wireline affiliates that are not available to other wireline carriers on the same terms and conditions); *id.* at 9 (there should be a five-year extension of all AT&T interconnection agreements); Peerless Petition at 12-13 (Commission should impose numerous conditions related to direct interconnection and transit services); Earthlink Petition at 9-10 (AT&T should be required to receive traffic in IP format from its competitors, rather than requiring them to convert traffic to TDM format); *id.* at 9-10, 22 (AT&T should be barred from retiring copper facilities); PAETEC Petition at 2-3, 17-18 (same); Logix Petition at 14 (AT&T should be barred from increasing prices for transit service).

⁴²² See, e.g., Japan Communications Petition at 2, 7-8, 12-17; USA Mobility Petition at 3-7, 12-16; Consumers Electronics Retailers Coalition Petition at 5, 29-30, 34-35.

⁴²³ See 47 C.F.R. § 20.12(b).

marketplace is robustly competitive and will remain so after the merger. In any event, T-Mobile USA is not a significant source of wholesale competition, and its departure from the market will not have a significant competitive impact.

The original resale rule barred unreasonable restrictions on the resale of cellular, broadband PCS, and SMR services.⁴²⁴ Significantly, that rule was far less burdensome than the one that merger opponents propose here: it merely required wireless providers to make their retail services available for resale, and it did “not require providers to structure their . . . offerings in any particular way, such as to promote resale, . . . establish a margin for resellers, or guarantee resellers a profit.”⁴²⁵ That rule expired on November 24, 2002⁴²⁶—almost nine years ago. The decision to sunset the rule reflected the Commission’s judgment that the wireless market was sufficiently competitive that wholesaling requirements were not necessary to promote competition.⁴²⁷

⁴²⁴ *Id.* § 20.12(b)(1).

⁴²⁵ Memorandum Opinion and Order and Notice of Proposed Rulemaking, *Personal Communications Industry Association’s Broadband Personal Communications Services Alliance’s Petition for Forbearance for Broadband Personal Communications Services; Biennial Regulatory Review—Elimination or Streamlining of Unnecessary and Obsolete CMRS Regulations; Forbearance from Applying Provisions of the Communications Act to Wireless Telecommunications Carriers; Further Forbearance from Title II Regulation for Certain Types of Commercial Mobile Radio Service Providers, GTE Petition for Reconsideration*, 13 FCC Rcd 16857, 16874 ¶ 33 (1998).

⁴²⁶ 47 C.F.R. § 20.12(b)(3).

⁴²⁷ First Report and Order, *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, 11 FCC Rcd 18455, 18468 ¶ 24 (1996) (finding that the “competitive development of broadband PCS service will obviate the need for a resale rule in the cellular and broadband PCS market sector”) (“1996 Resale Order”).

Since then, the Commission has repeatedly rejected attempts to resurrect the resale rule.⁴²⁸ For example, in a 2007 order that reaffirmed the requirement of CMRS carriers to provide roaming services, the Commission specifically noted that “the automatic roaming obligation under Sections 201 and 202 and the home roaming exclusion are not intended to resurrect CMRS resale obligations. . . . We note that the Commission’s mandatory resale rule was sunset in 2002, and automatic roaming obligations cannot be used as a backdoor way to create *de facto* mandatory resale obligations or virtual reseller networks.”⁴²⁹ The Commission reaffirmed that conclusion in a 2010 order that eliminated the home roaming exclusion established by the 2007 order. As it explained, “[w]hile resale obligations are intended to offer carriers the opportunity to market a competitive retail service without facilities development, such a resale product would not serve our goals of promoting facilities-based competition, the development of spectrum resources, and the availability of ubiquitous coverage.”⁴³⁰ And just this April, the Commission again reaffirmed this position when it adopted the data-roaming rules.⁴³¹

⁴²⁸ See, e.g., Memorandum Opinion and Order on Reconsideration, *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, 1999 WL 759700, FCC 99-250, ¶ 20-21 (1999) (rejecting extension of sunset date for resale rule).

⁴²⁹ Report and Order and Further Notice of Proposed Rulemaking, *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, 22 FCC Rcd 15817, 15836 ¶ 51 (2007) (“*Roaming Report and Order*”).

⁴³⁰ Order on Reconsideration and Second Further Notice of Proposed Rulemaking, *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, 25 FCC Rcd 4181, 4199 ¶ 35 (2010).

⁴³¹ Second Report and Order, *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, 26 FCC Rcd 5411, 5429-31 ¶¶ 34, 38 & n.116 (2011) (“*Roaming Second Report and Order*”).

There is no justification for abruptly changing course here and imposing a resale obligation on a single provider, let alone an obligation with an unprecedented price-regulation component. The wireless market is robustly competitive today and will remain so after the merger.⁴³² In fact, the competitive wholesale market that will continue to exist post-merger is derivative of the robustly competitive retail wireless market. Wholesale services are already widely available today from a variety of established providers.⁴³³ Moreover, *every* facilities-based carrier that is not already a wholesaler is a potential entrant in that marketplace. Should the prices charged for wholesale services exceed competitive levels, entrance would be immediate, because there are no barriers to entry: any facilities-based carrier may begin wholesaling at any time. In addition, a new facilities-based *wholesaler* (Clearwire) has entered the market, and another (LightSquared) will soon enter—and both are committed to offering wholesale services on a nationwide basis.⁴³⁴

In any event, T-Mobile USA is not a significant competitor in the wholesale marketplace. It has only two significant wholesale customers: TracFone and Simple Mobile.⁴³⁵ TracFone resells the services of T-Mobile USA, Verizon, and AT&T, and it will continue to have multiple

⁴³² See Section II.C.1, *supra*.

⁴³³ See, e.g., Verizon Wireless, *Wholesale Solution*, <http://www.verizonwireless.com/b2c/aboutUs/reseller/index.jsp>; Sprint, *Sprint Wholesale | Private Label Wireless Voice and Data Solutions for MVNO*, <http://wholesale.sprint.com/wireless-voice-data>.

⁴³⁴ See LightSquared, *Operating Model*, <http://www.lightsquared.com/what-we-do/operating-model/>; Clearwire Corp., Annual Report (2010 10-K), at 7 (Feb. 22, 2011) (noting that wholesale partners account for “approximately 74% of [its] ending subscriber base as of December 31, 2010”) (“*Clearwire 2010 10-K*”).

⁴³⁵ USA Mobility is not a wholesale customer of T-Mobile USA. USA Mobility has a dealer relationship whereby it sells T-Mobile USA service plans.

wholesale options post-merger.⁴³⁶ **[Begin Confidential Information]**

[End Confidential Information] In short, the departure of T-Mobile USA from the marketplace will not significantly impact wholesale competition.

Merger opponents are simply wrong when they claim that the available wholesale options are inadequate. *See* Carlton Reply Decl. ¶ 143. For example, assertions that the merger will lead to a wholesale “monopoly” in a particular air-interface—GSM—are not accurate.⁴³⁷ The very nature of a wholesale relationship is that the reseller does not have a network and is not beholden to any particular technology or air-interface. As TracFone shows, wholesale customers can and do split their business among multiple carriers using different technologies. Likewise, complaints that Clearwire and LightSquared are not adequate substitutes for wholesale service from nationwide carriers⁴³⁸ are contradicted by the facts. A number of resellers already rely on Clearwire for wholesale inputs to 4G WiMAX retail services, including Sprint, Time Warner Cable, and Comcast. Pub. Int. St. at 92. Clearwire also recently struck a wholesale deal with CBeyond, which is expected to begin offering service this year.⁴³⁹ And Clearwire also has entered into a wholesale agreement with Best Buy, under which the retailer will use Clearwire’s spectrum to market 4G services to customers at Best Buy’s retail outlets nationwide. Pub. Int. St. at 92-93; *Clearwire 2010 10-K* at 10. Similarly, LightSquared has entered into a wholesale

⁴³⁶ Mike Dano, *Surpassing Verizon, TracFone notches 1.1M net adds in Q4*, FierceWireless (Feb. 9, 2011), <http://www.fiercewireless.com/story/surpassing-verizon-tracfone-notches-11m-net-adds-q4/2011-02-09>.

⁴³⁷ *See, e.g.*, Rural Telecom Group Petition at 30-31; Cablevision Petition at 13.

⁴³⁸ *See, e.g.*, Japan Communications Petition at 14; Cablevision Petition at 11-12.

⁴³⁹ *Clearwire 2010 10-K* at 10.

agreement with Best Buy, and LightSquared's CEO recently disclosed that the company is negotiating spectrum contracts with 15 additional companies. *Id.* at 94. Finally, Clearwire subscribers can roam on Sprint's network,⁴⁴⁰ and LightSquared appears poised to reach a similar agreement with Sprint.⁴⁴¹ In short, resellers will continue to have a variety of competitive wholesale options post-merger.⁴⁴²

2. Conditions Related to Inputs.

Merger opponents ask the Commission to impose a host of conditions related to handsets (*e.g.*, a bar on exclusivity), special access and backhaul (*e.g.*, rate regulation), and roaming (*e.g.*, additional obligations).⁴⁴³ The Commission should reject these proposals for at least two

⁴⁴⁰ *Clearwire and Sprint Reach Roaming Accord*, *Sprint User Forum* (July 19, 2007), <http://www.sprintusers.com/forum/archive/index.php/t-138295.html> (visited June 4, 2011).

⁴⁴¹ Devindra Hardawar, *Sprint Close To \$20B LightSquared Deal for 4G LTE Rollout*, *MobileBeat* (June 3, 2011), <http://venturebeat.com/2011/06/03/sprint-lightsquared-4g-deal/>.

⁴⁴² In any event, the Commission would lack jurisdiction to impose a resale requirement for wireless data services. As the Commission has recognized, mobile broadband services are not "commercial mobile services," but are instead "private mobile services." *See* Declaratory Ruling, *Appropriate Regulatory Treatment for Broadband Access to the Internet over Wireless Networks*, 22 FCC Rcd 5901, 5917 ¶ 45 (2007) (mobile broadband Internet access service is a private mobile service because it "in and of itself does not provide th[e] capability to communicate with all users of the public switched network"); *see also* 47 U.S.C. § 332(d) (defining "commercial mobile services" and "private mobile services"). And under section 332(c)(2) of the Act, providers of private mobile services may not be treated as common carriers. 47 U.S.C. § 332(c)(2) ("A person engaged in the provision of a service that is a private mobile service shall not, insofar as such person is so engaged, be treated as a common carrier for any purpose under this Act."); *see also* Comments of AT&T Inc., *Framework for Broadband Internet Service*, GN Docket No. 10-127, at 112-14 (filed July 15, 2010). A requirement to offer mobile broadband services for resale to any requesting provider would be a common carrier obligation. Indeed, the original wireless resale rule was based on the obligations of common carriers under Sections 201 and 202 of the Communications Act. *See 1996 Resale Order*, 11 FCC Rcd at 18457 ¶ 3. Consequently, the Act bars the Commission from imposing such an obligation on mobile broadband services.

⁴⁴³ *See, e.g.*, Cincinnati Bell Petition at 30 (Commission should "forbid[] AT&T to enter into exclusive handset arrangements henceforth and requir[e] it to waive exclusivity in its existing

reasons. First, as discussed in detail above, there is no merit to the opponents’ arguments that the combined company could harm access to any of these inputs, and those arguments are not merger-specific in any event. *See* Section II.D, *supra*. Second, all of these input issues are the subjects of ongoing industry-wide proceedings and should be resolved in those forums.⁴⁴⁴

Provider-specific obligations would unjustifiably distort competition and could conflict with the Commission’s resolution of these same issues in the pending proceedings.

3. Pricing Conditions.

Merger opponents argue that the transaction will harm consumers in the absence of Commission rate regulation. Some suggest that the combined company should be required to offer T-Mobile USA’s existing rate plans to *all customers*, while others argue that the company

agreements”); MetroPCS Petition at v, 7, 73 (Commission should bar handset exclusivity); U.S. Cellular Petition at 3 (Commission “should impose cost-based restrictions on AT&T’s pricing of special access services”); Logix Petition at 10-11 (Commission should impose many obligations with respect to AT&T’s provision of “DS1, DS3, Ethernet, or other protocol type of local private line services”); MetroPCS Comments at iv, 7, 71-73 (Commission should impose roaming obligations, complete with pricing restrictions); Cablevision Comments at 16-18 (“AT&T should be required to offer data roaming at cost-based rates to both other cellular broadband and WiFi providers”) (capitalization altered).

⁴⁴⁴ See, e.g., *Rural Cellular Association Petition for Rulemaking Regarding Exclusivity Arrangements Between Commercial Wireless Carriers and Handset Manufacturers*, Rural Cellular Association, RM-11497 (filed May 20, 2008); *Petition to Confirm a Consumer’s Right to Use Internet Communications and Software and Attach Devices to Wireless Networks*, Skype Commc’ns S.A.R.L., RM-11361 (filed Feb. 20, 2007); Order and Notice of Proposed Rulemaking, *Special Access Rates for Price Cap Local Exchange Carriers*, AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services, 20 FCC Rcd 1994 (2005); Public Notice, *Parties Asked to Refresh Record in the Special Access Notice of Proposed Rulemaking Order*, 22 FCC Rcd 13352 (2007); Public Notice, *Parties Asked to Comment on Analytical Framework Necessary to Resolve Issues in the Special Access NPRM*, 24 FCC Rcd 13638 (2009); Public Notice, *Data Requested in Special Access NPRM*, 25 FCC Rcd 15146 (2010); *Data Roaming Order*, 26 FCC Rcd at 5411.

should be required to offer a low-tier price plan.⁴⁴⁵ But the Commission has consistently rejected such proposals, both in the context of specific transactions⁴⁴⁶ and on an industry-wide basis,⁴⁴⁷ and it should continue to do so here.

As a threshold matter, merger opponents' predictions of consumer harm all rest on the premise that the transaction will impair competition and lead to higher prices. As discussed in detail above, that premise is false because the combined company will continue to face intense

⁴⁴⁵ See, e.g., New Jersey Rate Counsel Petition at 40; American Antitrust Institute Petition at 14-15; New Media Rights Petition at 13-14; Consumers Union Petition at 45-47; National Hispanic Media Coalition at 7-8; Larmon Comments at 2.

⁴⁴⁶ See, e.g., *Verizon/RCC Order*, 23 FCC Rcd at 12515-17 ¶¶ 123-25 (rejecting the “proposed condition that Verizon Wireless be required to maintain RCC’s customer rate plans”); *id.* at 12519 ¶ 130 (rejecting proposed conditions to “dictat[e] the nature and terms of services to be offered”); *Verizon/Alltel Order*, 23 FCC Rcd at 17510-11 ¶ 145 & n.502 (dismissing the concern that “subscribers may lose access to unique ALLTEL calling plans”).

⁴⁴⁷ See, e.g., Memorandum Opinion and Order, *Petition of ACS Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended, for Forbearance from Certain Dominant Carrier Regulation of its Interstate Access Services, and for Forbearance from Title II Regulation of its Broadband Services, in the Anchorage, Alaska, Incumbent Local Exchange Carrier Study Area*, 22 FCC Rcd 16304, 16330-31 ¶ 58 (2007) (finding that rate regulation is not necessary to ensure just and reasonable rates because of the significant competition faced by the carrier); Memorandum Opinion and Order, *Kiefer v. Paging Network, Inc.*, 16 FCC Rcd 19129, 19132 ¶ 7 (2001) (“We adhere to the views expressed by the Commission in *SBMS* and other proceedings, that market forces should generally govern the rates and charges assessed by CMRS providers.”); Memorandum Opinion and Order, *Orloff v. Vodafone AirTouch Licensees LLC*, 17 FCC Rcd 8987, 8998 ¶ 24 (2002) (“[T]he Commission has regulated CMRS through competitive market forces, declining to impose specific cost-based regulations on CMRS providers.”); *Roaming Report and Order*, 22 FCC Rcd at 15831 ¶ 35 (declining to impose rate regulation of automatic roaming services and expressing the Commission’s “preference for allowing competitive market forces to govern rate and rate structures for wireless services”); Memorandum Opinion and Order, *Southwestern Bell Mobile Systems, Inc., Petition for a Declaratory Ruling Regarding the Just and Reasonable Nature of, and State Challenges to, Rates Charged by CMRS Providers when Charging for Incoming Calls and Charging for Calls in Whole-Minute Increments*, 14 FCC Rcd 19898, 19902 ¶ 9 (1999) (“[A]s a matter of Congressional and Commission policy, there is a general preference that the CMRS industry be governed by the competitive forces of the marketplace, rather than by governmental regulation.”) (internal quotation marks omitted).

competition from a number of providers, including value-oriented providers such as MetroPCS and Leap. *See* Section II, *supra*. Moreover, as also discussed above, this transaction will increase network capacity and total industry output, and it will therefore produce lower prices than would prevail in the absence of the transaction. *See* Section I.A.3, *supra*. History provides further reason to reject rate-regulation proposals. From 1999 to 2009, the average price of wireless voice services dropped 50 percent amid substantial industry consolidation, despite widespread and erroneous predictions that such consolidation would lead to higher prices.⁴⁴⁸ And text-messaging and data prices have plummeted as well. *See* Pub. Int. St. at 65-67.

For similar reasons, there is no basis to require the combined company to offer T-Mobile USA's existing rate plans to new customers. The Commission has rejected this condition in prior transactions, including the Verizon/RCC merger,⁴⁴⁹ and there is no reason to reverse course here. AT&T already offers a broad selection of service plans, and competition will ensure that the combined company continues to do so. Moreover, as discussed, existing T-Mobile USA customers will be able to keep their rate plans even if they renew their contracts, and even if they exchange their existing handset for a comparable handset from AT&T's device portfolio. Moore Decl. ¶ 30; Christopher Reply Decl. ¶ 39; *see* Section I.A.3, *supra*. It would be unjustified and unprecedented for the Commission to impose any further pricing condition.

⁴⁴⁸ *See* GAO, *Telecommunications: Enhanced Data Collection Could Help FCC Better Monitor Competition in the Wireless Industry*, at 24 (July 2010), <http://www.gao.gov/new.items/d10779.pdf> (“GAO 2010 Report”).

⁴⁴⁹ *Verizon/RCC Order*, 23 FCC Rcd at 12515-17 ¶¶ 123-25.

4. Privacy Conditions.

Merger opponents argue that the transaction will undermine consumer privacy because “AT&T will have access to expansive amounts of customer data including location, financial, and behavioral data collected from mobile Internet use.” New Media Rights Petition at 25. But this is not a merger-specific concern. Opponents fail to identify any way in which the merger would enhance AT&T’s ability to collect and use data about its customers. And, while they suggest that the addition of T-Mobile USA’s customers will alter AT&T’s incentives, *id.*, AT&T already has tens of millions of customers, and increasing that customer base will not somehow give AT&T a new incentive to violate its customers’ trust and misuse their data. Just as they would today, such actions would damage AT&T’s reputation and harm its ability to compete successfully.

AT&T has a longstanding commitment to protecting customer privacy. It introduced a new, consumer-friendly privacy policy in June 2009 that reflects the company’s commitment to consumer-centric principles of vigorous privacy protection, transparency, robust consumer control, and the use of data to deliver value to consumers.⁴⁵⁰ AT&T provides clear notice to customers describing how it uses and shares their information, and offers them choices and tools to manage their privacy.⁴⁵¹ AT&T also has created a consumer-focused website dedicated to explaining its privacy policy in plain language.⁴⁵² To ensure that it is keeping pace with technology changes, AT&T also monitors and updates its privacy policy. For example, AT&T

⁴⁵⁰ AT&T, *AT&T Launches New Unified Privacy Policy*, http://www.att.com/Common/about_us/public_policy/Unified_Privacy_Policy.pdf.

⁴⁵¹ AT&T, *Privacy Policy*, http://www.att.com/Common/about_us/privacy_policy/print_policy.html.

⁴⁵² See AT&T, *Privacy Policy*, <http://www.att.com/privacy>.

released an updated policy in November 2010—which, after a period of customer feedback, became effective on March 1, 2011—to, among other things, expand its disclosures concerning location information and its use of aggregate information.⁴⁵³ Such attention to consumer privacy has made AT&T an industry leader on this issue. Indeed, the company has been recognized as a “Most Trusted Company in Privacy” by the Ponemon Institute, an information-security research company.⁴⁵⁴

Merger opponents offer no reason to doubt AT&T’s continued commitment to consumer privacy, and, accordingly, a privacy-related condition would not be merger-specific. Moreover, such a condition would make no sense as a policy matter. As the Federal Trade Commission has warned in the context of a merger review, “regulating the privacy requirements of just one company could itself pose a serious detriment to competition” and harm consumers.⁴⁵⁵ Finally, there is no need for the Commission to address this issue, because both Congress and the Federal Trade Commission already are examining mobile privacy issues on an industry-wide basis.⁴⁵⁶

⁴⁵³ Bob Quinn, AT&T Public Policy Blog, *Shedding Light on a Few Things* (Nov. 17, 2010), <http://attpublicpolicy.com/privacy/shedding-light-on-a-few-things/>; AT&T, *Privacy Policy*, www.att.com/privacy/.

⁴⁵⁴ Press Release, *AT&T Named One of the Most Trusted Companies in Privacy* (Feb. 25, 2010), <http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=30569&mapcode=corporate|mk-att-customer-experienc>. The Ponemon Institute conducted a nationwide survey of more than 99,000 U.S. adults in the fourth quarter of 2009, and identified those companies that consumers trusted most to honor their privacy commitments. *Id.*

⁴⁵⁵ *Statement of Federal Trade Commission Concerning Google/DoubleClick*, FTC File No. 071-0170, at 2 (Dec. 20, 2007), <http://www.ftc.gov/os/caselist/0710170/071220statement.pdf>.

⁴⁵⁶ See, e.g., Do-Not-Track Online Act of 2011, S.913, 112th Cong. (directing the FTC to promulgate “regulations . . . by which an individual can simply and easily indicate whether [they] prefer[] to have personal information collected by . . . providers of mobile applications and services”); Commercial Privacy Bill of Rights Act of 2011, S.799, 112th Cong. (defining protected personally identifiable information to include a “mobile device number”); FTC, Bureau of Consumer Protection, *A Preliminary FTC Staff Report on Protecting Consumer Privacy in an*

5. Universal Service Funding.

The Commission should reject proposed conditions that would require the combined company to forgo federal high-cost universal service funding for competitive eligible telecommunications carriers (“CETCs”).⁴⁵⁷ AT&T has voluntarily committed not to seek high-cost support in connection with its deployment of LTE to more than 97 percent of the U.S. population.⁴⁵⁸ And the Commission already has placed reasonable limits on all CETC funding in its *Interim Cap Order*, which caps such support at March 2008 levels on a state-by-state basis.⁴⁵⁹ The combined company will be subject to these limits, and any additional restrictions are unwarranted. The Commission should address CETC reform in the context of its industry-wide universal service reform proceeding,⁴⁶⁰ and not single out AT&T for discriminatory treatment in the context of this merger review.

Era of Rapid Change: A Proposed Framework for Businesses and Policymakers (Dec. 2010), <http://www.ftc.gov/os/2010/12/101201privacyreport.pdf>; FTC Town Hall, *Beyond Voice: Mapping the Mobile Marketplace* (May 6-7, 2008), <http://www.ftc.gov/bcp/workshops/mobilemarket/index.shtml>; Prepared Statement of David Vladeck, Director, Federal Trade Commission Bureau of Consumer Protection, Hearing of the Senate Committee on Commerce, Science, and Transportation, at 3-5, 10-23 (May 19, 2011), <http://www.ftc.gov/os/testimony/110519mobilemarketplace.pdf> (discussing the FTC’s efforts to protect mobile customers’ privacy).

⁴⁵⁷ See, e.g., New Jersey Rate Counsel Petition at 51; U.S. Cellular Petition at 11.

⁴⁵⁸ See Section I.B.1, *supra*. See also P. Goldstein, *AT&T, Sprint spar over T-Mobile deal at congressional hearing*, Fierce Wireless (May 11, 2011), <http://www.fiercewireless.com/story/att-sprint-spar-over-t-mobile-deal-congressional-hearing/2011-05-11> (noting AT&T CEO Randall Stephenson’s statement that “AT&T will not need to use Universal Service Fund money to reach its LTE buildout targets”).

⁴⁵⁹ Order, *High-Cost Universal Service Support, Federal-State Joint Board on Universal Service*, 23 FCC Rcd 8834 (2008).

⁴⁶⁰ Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, *Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing an*

Merger opponents also argue that the combined company should not receive federal high-cost support because of its increased size.⁴⁶¹ But such a condition would contravene the Commission’s requirement that universal service policies “be competitively neutral ... [and] neither unfairly advantage nor disadvantage one provider over another.”⁴⁶² Other large wireless providers currently receive substantial universal service support and will continue to do so. The combined company will compete with those large providers and with smaller rural and regional carriers for customers in high-cost areas. Depriving only the combined company of universal service support would unfairly disadvantage it with respect to its competitors.

6. Early Termination Fees and Bill Shock

The Commission should reject proposed conditions that would restrict early termination fees (“ETFs”) or require adoption of additional measures to prevent “bill shock.”⁴⁶³ Neither of these issues is merger-specific, and, indeed, both are the subject of ongoing industry-wide proceedings.⁴⁶⁴ Consequently, neither would be the proper subject of a merger condition.

Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up, 26 FCC Rcd 4554, 4647-48 ¶¶ 274-80 (2011) (“2011 ICC/USF NPRM”).

⁴⁶¹ See New Jersey Rate Counsel Comments at 51. Indeed, the New Jersey Rate Counsel suggests (at 51) that AT&T should be required to forgo *all* high-cost universal service funding, and not merely CETC support. But AT&T relies on the former to provide wireline communications services in some of the highest-cost rural areas in the country, and nothing about this transaction reduces AT&T’s need for that support.

⁴⁶² Report and Order, *Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776, ¶ 47 (1997), *rev’d in part on other grounds sub nom. Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999); *see also* 47 U.S.C. § 254(b)(7).

⁴⁶³ See, e.g., Larmon Comments at 2 (ETFs); Van Valkenburgh Petition at 2-3 (ETFs); Black Economic Council Comments at 4 (bill shock); New Media Rights Petition at 20-22 (bill shock).

⁴⁶⁴ See Notice of Proposed Rulemaking, *Empowering Consumers to Avoid Bill Shock; Consumer Information and Disclosure*, 25 FCC Rcd 14625 (2010); Press Release, *FCC Survey Confirms Consumers Experience Mobile Bill Shock and Confusion About Early Termination*

Rather, adopting such conditions for the merged company alone “could distort competitive market conditions, resulting in favoring some providers over others unjustly and unreasonably.”⁴⁶⁵

Nothing about this transaction will alter the status quo with respect to either ETFs or bill shock. Consumers who wish to avoid ETFs altogether will still be able to select no-contract service plans from a variety of providers, including the combined company.⁴⁶⁶ And consumers who choose contract plans will not be subject to unreasonable ETFs either, as providers will still have every incentive to compete with respect to these fees. Finally, as AT&T has explained, ETFs provide important *benefits* to consumers because, among other things, they enable providers to offer handset discounts.⁴⁶⁷ As to bill shock, the combined company will continue to face competitive pressure to avoid practices that damage its reputation with consumers, including

Fees (May 26, 2010), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-298415A1.pdf (discussing the Commission’s nationwide survey and investigation concerning early termination fees and bill shock); FCC, *Early Termination Fees: What is the FCC doing about ETFs?*, <http://www.fcc.gov/cgb/etf/> (noting that in December 2009 and January 2010, the Commission’s Consumer Task Force issued letters to numerous mobile telephone service providers, including AT&T, Sprint Nextel, T-Mobile USA, Verizon, and Google, asking them for information about their services and fees, including ETFs).

⁴⁶⁵ *AT&T/Verizon Order*, 25 FCC Rcd at 8747 ¶ 99.

⁴⁶⁶ Like many other providers, AT&T gives prospective consumers a choice when they sign up for service: purchase a handset at the standard retail price from AT&T and select a no-commitment, month-to-month service plan, or choose a heavily discounted (or free) handset and sign-up for a two-year service plan. See Letter from Robert W. Quinn, Jr., Senior Vice President, Federal Regulatory, AT&T, to Joel Gurin, Chief, Consumer and Governmental Affairs Bureau, FCC and Ruth Milkman, Chief, Wireless Telecommunications Bureau, FCC, at 1-3 (filed Feb. 23, 2010), http://transition.fcc.gov/cgb/etf/ATT_ETF_Response.pdf (“*Quinn Feb 23, 2010 Letter*”). Consumers also have a “Bring Your Own Device” option; they can bring a compatible handset of their choosing to AT&T’s network and obtain a service plan from AT&T. See *Your Device, Your Way*, <http://choice.att.com/flash/customersdevices.aspx>.

⁴⁶⁷ See, e.g., *Quinn Feb. 23, 2010 Letter* at 2-3, 10-11.

unwarranted surprises on consumer bills.⁴⁶⁸ Merger opponents offer no rationale for singling out the merged company for regulation of ETFs or bill shock policies.

7. Iowa Wireless Conditions.

T-Mobile USA holds an indirect, 54 percent ownership interest in Iowa Wireless Services, LLC (“Iowa Wireless”). Concerned that this transaction will undermine its ability to provide service to customers, Iowa Wireless urges the Commission to preserve the status quo by imposing several different conditions on the merged company.⁴⁶⁹ But as Iowa Wireless concedes in its petition, “AT&T has recently communicated to Iowa Wireless that AT&T will, consistent with its practice in similar transactions, honor [its] contractual and legal obligations arising out of the T-Mobile acquisition,”⁴⁷⁰ and, to the extent any complications arise due to the nature of

⁴⁶⁸ See Comments of AT&T Inc., *Empowering Customers to Avoid Bill Shock; Consumer Information and Disclosure*, CG Docket Nos. 10-207, 09-158, at 1-2, 6-8 (filed Jan. 10, 2011) (“AT&T Bill Shock Comments”); Reply Comments of AT&T Inc., *Empowering Customers to Avoid Bill Shock; Consumer Information and Disclosure*, CG Docket Nos. 10-207, 09-158, at 8-10 (filed Feb. 8, 2011). As AT&T has explained in detail in the ongoing bill shock proceeding, it offers a multitude of resources and tools to enable its customers to avoid billing surprises. For example, AT&T wireless customers receive a Customer Service Summary when they initiate service. This summary includes a description of the customer’s specific rate plan; the fixed and usage-sensitive charges applicable to the customer’s service; a description of AT&T’s cancellation and ETF policies; instructions for checking the customer’s voice and data usage levels; and instructions for contacting AT&T to get additional information. *AT&T Bill Shock Comments* at 10; *id.* at Exh. 1 (attaching sample Customer Service Summary). AT&T also enables customers to check their data usage by dialing *DATA# from their wireless handsets, and it sends smartphone data-plan customers text-message alerts when they have used 65%, 90%, and 100% of their monthly usage allotments. *Id.* at 18-20.

⁴⁶⁹ Iowa Wireless Petition at i-ii, 4-11. Among other things, Iowa Wireless argues that AT&T should be required to (i) maintain T-Mobile USA’s legacy networks until Iowa Wireless can transition to LTE; (ii) provide roaming services under terms similar to those in Iowa Wireless’s existing roaming agreement with T-Mobile USA; (iii) work with manufacturers to ensure that compatible handsets are available for Iowa Wireless’s network on a timely basis; and (iv) adhere to existing agreements between Iowa Wireless and T-Mobile USA.

⁴⁷⁰ *Id.* at 4.

the existing obligations, AT&T is committed to working with Iowa Wireless to find a mutually acceptable alternative business solution. As such, Iowa Wireless will not be harmed by the transaction, and thus it is neither necessary nor appropriate for the Commission to impose conditions to prevent such harm.⁴⁷¹

MISCELLANEOUS ISSUES

A. The Commission's Procedures Are Consistent with the Communications Act.

As it has in other merger proceedings involving wireless licenses, Cellular South asserts that the procedures the Commission has adopted in this proceeding violate, *inter alia*, sections 307, 308, and 309 of the Communications Act. *See* Cellular South Petition at 12-30. The Commission has rejected these arguments in the past and should do so again here.⁴⁷²

Reduced to its basics, Cellular South's position is that sections 307 through 309 prescribe the procedures that the Commission must follow in license proceedings and preclude the Commission from employing additional procedures that will permit greater participation. Cellular South cites no Commission order or court decision in support of that proposition, and

⁴⁷¹ To the extent that Iowa Wireless is asking the Commission to adjudicate its contractual rights, that issue is not properly before the Commission. Indeed, in addressing the merits of license-transfer applications, the Commission has consistently refused to consider allegations of breach of contract or other matters relating to general corporate or partnership relationships, as they involve issues of commercial law in which the Commission has no special expertise and which do not raise matters germane to the agency's authority. *See, e.g., Verizon/Alltel Order*, 23 FCC Rcd at 17538 ¶ 214 (refusing to consider the question of whether the transaction would violate existing reseller agreements because that constituted a private contractual dispute); *Sprint/Nextel Order*, 20 FCC Rcd at 14033-34 ¶¶ 180-81 (refusing to address allegations that merger approval would violate agreements between the applicant and its affiliates because private contractual disputes are "not relevant to our public interest analysis" and are "best resolved by the parties, or in courts of competent jurisdiction").

⁴⁷² *See, e.g., AT&T/Verizon Order*, 25 FCC Rcd at 8769-72 ¶¶ 154-59; *AT&T/Centennial Order*, 24 FCC Rcd at 13976-78 ¶¶ 153-57.

there is none. To the contrary, the courts have upheld Commission decisions in licensing proceedings where the Commission employed procedures similar to those adopted here.⁴⁷³ In this proceeding, as in others, the Commission “should be accorded broad discretion in establishing ... rules for ... public participation ... in vindicating the public interest.”⁴⁷⁴ Cellular South’s arguments should therefore be rejected.

B. AT&T Is Fully Qualified To Control T-Mobile USA’s Licenses and Authorizations.

TelLAWCom Labs Inc. has accused AT&T of misconduct in an effort to cast doubt on AT&T’s qualifications to control T-Mobile USA’s licenses.⁴⁷⁵ Proffering a litany of allegations, TelLAWCom and its principal, Leo Wrobel, assert that AT&T’s past conduct shows that it will not honor any commitments that the Commission might impose in this proceeding.⁴⁷⁶ None of these allegations is even arguably merger-specific. Moreover, many of them have been the subject of other proceedings, where they were resolved without any finding of inappropriate conduct by AT&T.⁴⁷⁷ Finally, these cursory allegations are vague and lack the supporting

⁴⁷³ See, e.g., *SBC Commc’ns Inc. v. FCC*, 56 F.3d 1484, 1496-97 (D.C. Cir. 1995); *United States v. FCC*, 652 F.2d 72, 91 (D.C. Cir. 1980) (en banc).

⁴⁷⁴ *Office of Commc’ns of United Church of Christ v. FCC*, 359 F.2d 994, 1005-06 (D.C. Cir. 1966).

⁴⁷⁵ See generally TelLAWCom Petition.

⁴⁷⁶ TelLAWCom Petition at 1, 6-7.

⁴⁷⁷ Mr. Wrobel’s principal complaint involves claims brought years ago on behalf of his own defunct company, Premiere Network Services Inc., before the Public Utility Commission of Texas. *Id.* at 2-4. But these claims were released as part of a settlement agreement between AT&T and a bankruptcy trustee that was approved—over Mr. Wrobel’s objections—by the bankruptcy court. See Order Granting Trustee’s Motion for Approval of Compromise and Settlement Pursuant to Bankruptcy Rule 9019, *In re Premiere Network Services, Inc.*, Case No. 04-33402-HDH-7 (N.D. Tex. Bankr., Dallas Div., filed Aug. 21, 2006). This court-approved settlement, which found no wrongdoing by AT&T, provides no basis for questioning AT&T’s

affidavits required by Section 1.939 of the Commission's rules.⁴⁷⁸ In short, these claims have no merit. Mr. Wrobel, who is essentially in the business of filing claims against AT&T, apparently is using this merger proceeding to support his consulting business. The Commission has repeatedly rejected similar claims in other mergers,⁴⁷⁹ and it should do so here as well.⁴⁸⁰

CONCLUSION

AT&T's acquisition of T-Mobile USA from Deutsche Telekom will serve the public interest. The Commission should expeditiously grant the applications to transfer control of T-Mobile USA's FCC authorizations to AT&T.

character. *See Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179, 1205 n.64 (1986) ("We do not believe it appropriate to consider consent decrees, entered into in the civil context, for the purpose of determining character qualifications. The act of consenting to such an agreement is not a wrongful act and does not necessarily imply wrongful conduct.").

⁴⁷⁸ 47 C.F.R. § 1.939(d). That section requires petitions to deny to contain "specific allegations of fact," supported by affidavit, "sufficient to make a *prima facie* showing" that the application should not be granted. No such affidavit has been provided, and, in fact, TelLAWCom offers no support whatsoever for nearly all of its allegations.

⁴⁷⁹ *See, e.g., Cingular/AT&T Order*, 19 FCC Rcd at 21550-51 ¶¶ 52-56; *SBC/BellSouth Order*, 15 FCC Rcd at 25465-66 ¶¶ 15-17; Memorandum Opinion and Order, *Applications of Ameritech Corp., and SBC Commc'ns Inc. for Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules*, 14 FCC Rcd 14712, 14947-50 ¶¶ 568-73 (1999), *vacated on other grounds by Association of Commc'ns Enters. v. FCC*, 235 F.3d 662 (D.C. Cir. 2001).

⁴⁸⁰ The Diogenes Telecommunications Project alleges that, "in the application, T-Mobile and AT&T have demonstrated a lack of candor and have made material misrepresentations to the FCC, thereby raising the issue of whether they lack the necessary qualifications to remain FCC licensees." Diogenes Petition at 1. Specifically, Diogenes questions whether AT&T "is facing an imminent spectrum crunch" and whether T-Mobile USA "is facing spectrum exhaust, and has no clear path to LTE." *Id.* at 26. It also claims that "AT&T's promised 97 percent LTE rollout is a sham designed to curry favor with the FCC." *Id.* at 16 (capitalization altered). These allegations are baseless for the reasons detailed above. *See* Sections I.A.1 and I.B.1.

REDACTED – FOR PUBLIC INSPECTION

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